REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCA 19 OF 2017

MUTHURI M'RINYIRU.....APPELLANT

VS

GEOFFREY GITONGA M'RINYIRU.....1ST RESPONDENT

MARANGU M'RINYIRU.....2ND RESPONDENT

CONSOLIDATED WITH ELCA 21 OF 2017

GEOFFREY GITONGA M'RINYIRU.....1ST APPELLANT

MARANGU M'RINYIRU.....2ND APPELLANT

VS

MUTHURI M'RINYIRU..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgement and decree of the learned trial magistrate Hon. Mayamba C.A. in Githongo SRMCC No. 29 of 2014 dated and delivered on 14/7/17. In the said case, Geoffrey Gitonga M'Rinyiru and Murangu M'Rinyiru who are the Appellants in Civil Appeal Number 21 of 2017 were the Plaintiffs whereas Muthuri M'Rinyiru named herein as the Respondent was the Defendant. The parties have simply changed roles concerning ELCA No. 19 of 2017. For the purposes of this judgment, Geoffrey Gitonga M'Rinyiru and Murangu M'Rinyiru will be referred to as the Appellants whereas Muthuri M'Rinyiru will be called the Respondent.

2. Brief facts of the case before the trial Court was that the Appellants and the Respondent are siblings being sons of M'RINYIRU s/o MATIRI but different mothers. Their deceased father had two houses. The Appellants' mother was called NJIRU M'RINYURI while that of the Respondent was called KARIMBI M'RINYIRU. The original suit land parcel NKUENE/KATHERA/288 (original suit land) belonged to their deceased father measuring about 5.65 hectares or 13.9 acres. He was registered as owner on 3/4/63. He settled his family including the parties herein on this land. After his death, succession petition was filed and the suit land was divided amongst the 3 sons equally. They became registered as owners on 3/7/78 according to the certified copy of the green card on record. The Respondent's mother lodged a caution on the original land on the 17/4/79 claiming beneficial interest.

3. That the said KARIMBI, the mother of the Respondent had filed Meru HCCC No. 112 of 1984 claiming beneficial right in the original land. The Learned Judge Justice P N Tank determined the matter as follows;

> "as per the succession cause No DM 4 of 1978 Meru, the parcel Land NKUENE/KATHERA/288 was divided into three equal portions each for the three sons of the late RINYIRU s/o MATIRI. The said three portions were numbered 1051, 1052 and 1053. The Plaintiff in this case is the widow of said late RINYIRU. If at all she had any interest in the land she ought to have applied to join as a party in the said succession suit. Now she is …..by this suit, half share of the said land parcel 288, which is no more in the Registry of the land as one parcel.
>
> Failing to take any active interest in the said succession cause No. 4 of 1978 and now filing of this suit is but an abuse of the process of the court.
>
> Under the circumstances, I rule that the plaint be struck off and dismissed with costs."

4. It is stated in the pleadings that the said KARIMBI w/o M'RINYIRU passed on in the year 2003.

5. In the year 2005 the 1st Appellant filed Misc Application CMCC No. 68 of 2005 on 22/7/2005 against KARIMBI M'RINYIRU exparte under section 133 (1) of the then Land Registration Act , CAP 300 seeking orders to remove the caution lodged on the suit land by the said deceased KARIMBI w/o M'RINYIRU. Similarly he also filed another exparte application on the 29/3/07 against the said deceased party seeking orders that the Executive Officer of the Court be authorized to sign the partition forms on behalf Respondent, one of the equal holders of the original land NKUENE/KATHERA/288 who could not be found, so as to effect the orders of the Court dated the 16/8/2005. The Court on the 3/10/2007 issued an order granting his prayers.

6. Armed with the said orders of the Court the Appellants completed the partitioning of the original suit land into three parcels leading to the issuance of titles No 1051, 1052 and 1053 (suit lands) in the names of the 1st and 2nd Appellants and Respondent respectively. From the mutation records in the file it would appear that, the process of subdivision of the original suit land commenced in 1984 as is captured in the Ruling of Hon Justice P N Tank.

7. The Appellants' case in the lower Court therefore was that the Respondent is in occupation of a larger share more than the 1/3 of the suit land (5 acres in excess of his entitlement from the Appellant's 1051 and 1052) before the subdivision was done by the succession Court and has refused to confine himself to the 1/3 of the land as comprised in parcel 1053. The Appellants sought orders to evict and remove the Respondent from portions of parcel 1051 and 1052 that he had occupying/encroached, pay damages for unlawful occupation of the Appellants' land as well as mesne profits and a refund of Kshs. 5458/- share of the subdivision expenses.

8. The Respondent denied the Appellants' claims in his statement of defence filed on the 20/1/09 when he stated that the portion he is occupying was given to him by his father and denied having encroached onto the Appellants' lands.

9. On the 13/11/2014, the Respondent filed a motion seeking to amend the defense and include a counterclaim. The motion was opposed by the Appellants on the grounds inter-alia that the counterclaim introduced a new cause of action, which should be tried independently of the suit. On the 27/2/15 the Court determined the motion on its merits and found it unmerited and dismissed it. A Preliminary objection raised by the Respondent on 22/7/2015 on the grounds that the suit was res-judicata in view of the Meru HCCC No 112 of 1984, Meru Misc Application No 68 of 2005, Misc Application No 68 of 2007, faced the same fate when the Court determined it on 2/10/15 and found it for dismissal. This paved the way for the suit to proceed for hearing.

10. The 1st Appellant informed the Court that they are all related being sons of Runyiru. That their father

died in 1952 before the demarcation of the land in 1963. Further, he informed the Court that the 1st House (Karimbi) had one son but his mother had two sons. The original land was registered in his name in 1963 after his father's death. That the Respondent has been on the land since 1965 when the Appellants were still young. That following the orders in succession cause No 4 of 1978 the land was divided into three equal parts and registered as such on the title in the names of the parties herein. Later the Respondent's mother raised an objection in the succession cause in HCCC No 112 of 1984 but was dismissed in 1984. The Respondent did not raise any objection to the succession cause.

11. That the subdivision commenced in 1984 but the Respondent was uncooperative in signing the mutation and partition forms prompting him to file Misc App No 68 of 2005 and 2008 for purposes of removing the caution that had been lodged by the Respondent's mother as well as to authorize the Executive officer of the Court to execute the mutation forms and partition on behalf of the Respondent. By then Karimbi, the Respondent's mother had died in 2003. Subdivision was concluded on the ground and 3 titles were issued in 2008 but the Respondent refused to collect his from the land's office. That the Respondent destroyed the boundaries on the land. He did not show the Court any evidence in support of this averment though. That the Respondent occupies over 2 acres of his land through force and threats and has refused to move out.

12. PW2- the 2nd Appellant reiterated the relationship of the parties and claimed that the Respondent has encroached onto half of his land and removed boundaries which he reported to the police station at Nkubu. No police report was adduced to support this claim. Asked in cross examination about the encroachment, he stated that he knows from his knowledge when the the surveyor pointed out the boundaries on the ground to him. He did not produce any survey map to show the encroachment. PW3- Samuel Ngaku Kaburuki stated that indeed the Respondent has encroached on to the Appellants' lands and cultivates by force. His attempt to arbitrate fell on deaf ears as the Respondent was not receptive to advise.

13. The Respondent led evidence and stated that the Appellants are his stepbrothers. That he was born in 1974 and his father died in 1950 when aged about 6 years. He was killed by his brother M'NAKATA M'MATERI in a fight over a cow. That the land was registered in the name of his mother though he did not produce any documents to support the assertion. That the land was subdivided in 1963 and each settled on their own portions. He stated that he was a party in the succession cause No 4 of 1978 and he appealed against the decision of the probate Court. He did not produce any documents to support the averment. That he was given the land by his clan KARIMBA IN 1963. He is aware that his mother filed a suit in Court in 1984 but was dismissed. That he lives on the land that belonged to his mother and he has declined to collect the title because it does not belong to him. He does not recognize it.

14. He denied having encroached on their lands and to the contrary claimed that, the Appellants have encroached on his land. That he was not involved in the survey and subdivision of the land. He averred that the orders partitioning the land were illegal. His mother was sued in Misc application No 68 of 2005 and 2008 long after she had passed on in 2002. That he has not been shown a survey map to depict the encroachment, if any. He admitted that he uprooted the fixed boundaries installed by the surveyor and threw them away as the land is mine.

15. After hearing the case the learned Magistrate delivered her judgement on the 14/7/2017 in the following terms;

a. The Appellants are the rightful owners of parcel No NKUENE/KATHERA/ 1051 and 1052.

b. The order of eviction cannot be granted at this stage.

c. The order for refund of the amount incurred in the subdivision cannot be granted, as the parties did not tender receipts of proof.

d. Parties to register a boundary dispute with the land registrar to affix the boundary between parcels No.s No NKUENE/KATHERA/ 1051, 1052 & 1053.

e. Each party to bear their own costs.

16. It is this Judgment that aggrieved all the parties but for different reasons precipitating the filing of the twin appeals; ELCA 19/2017 and ELCA 21/2017. ELCA 19/2017 is filed by the Respondent on the following grounds;

a. That the learned trial magistrate erred in law and fact in failing to find that the process leading to partition of land parcel No. NKUENE/KATHERA/288 was tainted with fraud and that the orders sought by the Appellants were intended to validate their fraudulent actions.

b. That the learned trial magistrate erred in law by failing to find that a Court of law cannot be used to aid a fraudulent litigant and on that basis proceed to dismiss the suit before him.

c. That the learned trial magistrate erred in law and facts in failing to dismiss the respondent's suit for insufficiency of evidence despite having found as much and instead made orders that had not been prayed for.

d. That the learned trial magistrate erred in law and fact in failing to find that the Respondent was the successful party in the suit before him and therefore was entitled to costs of the suit.

e. That judgement of the learned trial magistrate is against law and weight of evidence on record.

17. While ELCA 21/2017 is filed by the Appellants/ on the following grounds that the Learned Magistrate ;

a. Ignored, refused and eschewed to consider and evaluate the evidence brought before him and turned to a wild goose chase.

b. Failed to follow pleadings and oral evidence tendered before him amend and instead went into a fishing spree and refused to follow the law as submitted the Appellants' Counsel.

c. Imported non-issues to justify his biased and skewed verdict.

d. Advised the parties to follow a route unknown in land and therefore rendered injustice to the parties.

18. On the 18/10/18, the parties elected with the concurrence of the Court to have the two appeals heard simultaneously and canvassed through written submissions.

19. From this juncture, I will deal with the appeals in turns.

20. In respect to ELCA 19/2017, the Respondent submitted that the land was initially registered in the joint names of the parties following the conclusion of succession and transmission. Vide Misc Application No 68 of 2005 the 1st Respondent sued his mother for partitioning of the land long after she had passed away. The Respondent, a joint owner of the suit land was not made a party and his rights to be heard in the partitioning were not entertained. In the motion, the 1st Respondent failed to disclose material facts as a result that the process of partitioning was illegal and tainted with fraud. The Court was misled into aiding an illegality and a fraud on the Respondent. That the trail magistrate erred in failing to find that the partitioning was fraudulent. The non- disclosure coupled with non- joinder of the Respondent in the Misc. App No 68 of 2005 was a way to deprive the Respondent of his land.

21. Relying on the case **of Kenya Airways Limited Vs Satwant Singh Flora (2013) EKLR** the Respondent submitted that a Court of law should not be used to enforce an illegality or otherwise aid a fraudulent party. In that case, the Court emphatically stated that no Court should enforce an illegality or fraud once such illegality and or fraud has been brought to its attention. That once evidence is adduced to prove that a party was fraudulent or involved in illegality then a Court ought not to assist them. He faulted

the trial Court for doing that despite the Respondent adducing sufficient evidence to prove the fraud.

22. The Court received submissions that there were no survey reports produced by the Appellants to show that indeed there was encroachment of 2.5 acres each as alleged. That in the absence of a surveyors report the Court could only have speculated, as a dispute on encroachment cannot be properly determined without a surveyor's report, more so when the Respondent in his defence asserted that it is the Appellants who had encroached onto his land. He relied on the case of **John Wanyonyi Makokha VCs Donald Wanyama Shirulikha (2014) EKLR** and **Tahir Sheikh Said Vs Professor Abdalla Burja (2010) EKLR.** That though the Court agreed that failure to tender a surveyor's report is fatal to the respondent's case it went ahead and cured the defect instead of dismissing the case.

23. In conclusion the Respondent submitted and faulted the Court in reaching the decision it did in the face of the Respondent having proved that the subdivision of the original land was tainted with fraud and granting the prayers sought by the Appellants amounted to enforcing acts of fraud which is illegal which in turn lead to the deprivation of the Respondent's right to his own property. Secondly that the Appellants did not produce a survey map to prove encroachment.

24. In regard to appeal No.19 of 2019 the Appellants submit that the allegation of fraud is unfounded because the family Court pronounced itself that the parties herein being siblings and beneficiaries of the estate are entitled to equal shares of the estate and therefore the demarcation subdivisions were in line with that finding and subsequent issuance of titles. The Court made a reasoned finding by determining that the Appellants were rightful owners of parcel Nos. 1051 and 1052 respectively and also for finding that the matters raised related to a boundary dispute and directed for institution of the same. They also find no fault in failure to award costs to either side.

25. In respect to appeal No.21 of 2017, the Appellants focused their submissions on ground No.d, and abandoned the first three grounds. They stated that the Court should have made its findings in a ruling instead of a judgment. That in declaring that the parties should prefer a boundary dispute to fix the demarcations of the three plots the Court delivered a partial determination and abdicated its duty to arbitrate the dispute on issues brought before it to finality. In making a judgment the Court became functus officio and cannot having the opportunity to supervise its orders occasioning an injustice to the parties in the process. Even if the parties succeed in referring the matter to the Land Registrar and in the event that it is found that there is indeed encroachment, the parties will need the Court to enforce compliance of the Land Registrar's decision by way of eviction of the encroacher. The option of filing a fresh suit might be faced with the risk of being dismissed for being res-judicata.

26. The Appellants did not file any submissions in the ELCA 21 /2017 despite being the appellants in the appeal. Therefore it is safe to state that the appeal is not prosecuted I will however proceed to determine both appeals on their merits.

27. This being the first appellate Court my role will be to re-examine the evidence placed before the trial Court and see if I would have arrived at a different verdict. However, I must take into account that the trial Court had the opportunity to examine and assess the witnesses appearing before it, which advantage I do not have.

28. Having considered the pleadings, the evidence, the written submissions and all the material placed before me the issues that fall for determination are as follows;

a. Did the Respondent prove fraud on the part of the Appellants in effecting the partitioning of the original suit land, NKUENE/KATHERA/288 into 1051, 1052, and 1053?

b. Did the Appellants prove encroachment by the Respondent on the parcels namely NKUENE/KATHERA/1051 and 1052?

c. Whether the Respondent is entitled to all costs of the case in the lower court.

d. Who meets the costs of the appeal?

Did the Respondent prove fraud on the part of the Appellants in effecting the partitioning of the original suit land, NKUENE/KATHERA/288 into 1051, 1052, and 1053?

29. The trial Court has been faulted in its decision in the face of the Respondent's assertions that he proved fraud on the part of the Appellants' in carrying out partitioning of the original land using orders that were obtained without his involvement and yet he was the co- owner of the suit land. That the said orders were obtained despite his mother having been long dead when she was sued in 2005 and 2008. That the subdivision was done without his input and the partitioning was fraudulent intended to deprive him of his land. That the Court should not have decided in their favour because by so doing, it aided the illegal and fraudulent acts of the Appellants.

30. It is trite law that fraud, being a serious accusation must be pleaded, particularized and proved to the standard of probabilities, which is higher than in civil cases but slightly below that of criminal cases.

31. The Black's Law Dictionary defines fraud thus: -

> "Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another'. (Emphasis is mine).

32. In the case of In **R. G. Patel v. Lalji Makanji** (supra), the former Court of Appeal for Eastern Africa stated thus:-

> "Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

33. In the instant case, the Respondent in his defence did not contain a counterclaim. His attempts to amend the defence to include a counterclaim in which he intended to plead and particularize fraud on the part of the Appellants was thwarted by the Court in its ruling dated the 27/2/15 and ably stated in para 9 above.

34. The old adage that parties are bound by their pleadings is still apt. Similarly, the Court is equally bound by the pleadings of the parties. In the case of**MALAWI RAILWAYS LTD Vs. NYASULU[1998] MWSC 3,** in which the learned judges quoted with approval from an article by **Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in [1960]Current Legal problems,at P174** whereof the author had stated;

> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties, as they are themselves. It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute, which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a

party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

35. In the Ugandan case of**LIBYAN ARAB UGANDA BANK FOR FOREIGN TRADE AND DEVELOPMENT & ANOR Vs. ADAM VASSILIADIS**[1986] UG CA 6, the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in**JONES Vs. NATIONAL COAL BOARD**[1957]2 QB 55 that;

"In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."

36. In the Nigerian case of **ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLCS.C. 91/2002,** Judge Pius Aderemi J.S.C. expressed himself as follows;

"….it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;

"In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

37. It is therefore clear from the record that the issues of fraud raised by the Respondent are extraneous and cannot found the cause of action that he wishes to advance on appeal. He lost the opportunity to advance this argument when he lost the application for leave to amend the defense and include a counterclaim. There is no evidence on record to show that that ruling has been set aside, varied and or appealed. The Respondent is therefore estopped from this line of misadventure.

38. I find no grounds to find fault on the part of the learned Magistrate.

Did the Appellants prove encroachment by the Respondent on the parcels namely NKUENE/KATHERA/1051 and 1052?

39. In regards to this issue, I do not wish to reinvent the wheel. I concur with the decision cited in **John Wanyonyi Makokha VCs Donald Wanyama Shirulikha (2014) EKLR** and **Tahir Sheikh Said Vs Professor Abdalla Burja (2010) EKLR that** failure to tender a surveyor's report is fatal to the case of a party seeking to prove encroachment. The reasoning is because the Court is not clothed with technical expertise to determine if there is an encroachment or not except with the help of survey maps and reports prepared by qualified and practicing surveyors who are professionals in their right in these fields.

40. The learned trial Magistrate was right in arriving at this conclusion. Having made that finding perhaps, she should have dismissed the case of the Appellants for want of that key evidence. However, the lower Court took a detour perhaps to cure the defect and achieve substantive justice in the case. I do not find anything prejudicial or wrong in referring the matter for determination before the District Land Registrar. I say so because that is the law as enunciated in section 18(2) of the Land Registration Act. The statute states as follows;

"The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section".

41. That said, he ought to have given the parties liberty to apply.

Whether the Respondent entitled to all costs of the case in the lower court.

42. On the 14/7/2017 the lower Court made the following orders:-

a. The Appellants are the rightful owners of parcel No NKUENE/KATHERA/ 1051 and 1052.

b. The order of eviction cannot be granted at this stage.

c. The order for refund of the amount incurred in the subdivision cannot be granted, as the parties did not tender receipts of proof.

d. Parties to register a boundary dispute with the land registrar to affix the boundary between parcels No.s No NKUENE/KATHERA/ 1051, 1052 & 1053.

e. Each party to bear their own costs.

43. Ideally, costs ought to follow the event. Nevertheless, under section 27 of the Civil Procedure Act, the Court has discretion in the matter. Such action is taken judicially.

Except stating that he was entitled to full costs and alleging that he had won the case in the Court below, the Respondent did not address the Court on how the lower Court made an error in exercise of its discretion. I say alleged because the record of the lower Court quoted above shows that the Appellants successfully prosecuted their case on ownership of plot numbers 1051 and 1052 whereas the Respondent successfully defended the Appellants' claim on refund of survey fees. Discretion will be adversely affected if a party shows one or more that the decision complained is tainted with impropriety, irrationality or illegality. As stated above, the Respondent did not advert to any of these issues. This ground of appeal is declined.

44. In the upshot, the Court makes the following orders: -

a. Both appeal numbers 19 and 21 filed by the Respondent and Appellants respectively are dismissed.

b. The judgment of the lower Court is varied by adding a further order that the parties shall have liberty to apply.

c. Each party shall bear their own costs in the appeals set out in (a) above.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MERU THIS 8TH DAY OF APRIL 2019.

J. G. KEMEI

JUDGE

ELCA 21/2017

C/A Mutwiri

Ms. Mbijiwe for Respondent

Muchiri holding brief for Kaumbi for Appellants

ELCA 19/2017

In presence of;

C/A Mutwiri

Ms. Mbijiwe for Appellant

Muchiri holding brief for Kaumbi for respondents