



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL CASE NO 80 OF 2015

MAJOR KAHUNGU KAREBE..... APPELLANT

VERSUS

JONAS MUIRURI GITAU..... 1 ST RESPONDENT

FESLISTAS MUIRURI.....2 ND RESPONDENT

CASCADE ENTERPRISES LIMITED..... 3 RD RESPONDENT

(Being an appeal from the Judgment by the Honourable D Ole Keiwa (Mr) Principal Magistrate in Milimani CMCCC Number 8378 OF 2007 delivered on 30/1/2015).

JUDGMENT

Introduction

1. This appeal was lodged on 26/2/2015 as Nairobi High Court Civil Appeal Number 74 of 2015. On 7/10/2015, Aburili J issued an order transferring the appeal to the Environment and Land Court at Nairobi. It was subsequently received by the Environment and Land Court at Nairobi and registered as Nairobi ELC Appeal Number 80 of 2015.

2. The appeal arises from a judgment delivered on 30/1/2015 by Hon D Ole Keiwua, Senior Principal Magistrate, in Milimani Commercial Courts CMCCC Number 8378 of 2007 in which the appellant had sued the respondents contending that the respondents had trespassed onto his piece of land, Plot Number X3, Kahawa West (Infills), Nairobi. In their joint defence, the respondents contended that the suit property was legally owned by the 3rd respondent by virtue of a letter of allotment dated 21/9/2001. The matter proceeded to hearing *ex parte* on 3/11/2014 on the basis of an affidavit of service sworn on 30/10/2014 by one Edward Njuguna Kihara. Subsequently, the trial court rendered a judgment on 30/1/2015 striking out the appellant's suit.

Grounds of Appeal

3. Aggrieved by the judgment striking out the suit, the appellant brought this appeal seeking an order setting aside the impugned judgment and substituting therewith orders allowing his claim as prayed in the plaint. The appeal was based on the following grounds:

a) The learned magistrate erred in law and fact in taking judicial notice of the alleged fact of double allocation of plots and finding that the plaintiff's plot may be subject to such double allocation when there was no evidence to that effect.

b) The learned magistrate erred in law and fact in finding that the City Council of Nairobi should have been made a party to the suit when the plaintiff had no claim against the said party.

c) The learned magistrate erred in law and in fact in finding that the subject plot had a value in excess of Kshs. 5,000,000 when there was no evidence to that effect.

d) The learned magistrate erred in law and in fact in failing to find in favour of the appellant.

Hearing

4. This appeal was first listed before me on 13/6/2017. On that day, I set down the appeal for hearing on 20/9/2017. There was no attendance on 20/9/2017 and the appeal was dismissed. The appellant subsequently brought an application for reinstatement whereupon the appeal was reinstated and set down for hearing on 25/10/2018. On 25/10/2018, I adjourned the hearing to 28/1/2019 and directed the appellant to serve a hearing notice through an advertisement in either the Daily Nation or the Standard Newspaper. A notice was subsequently carried in the

Standard Newspaper on 2/1/2019. The respondent did not attend court on the day appointed for the hearing of the appeal. The appellant's advocate attended and informed the court that he had filed written submissions and requested the court to render a determination on the basis of the written submissions. Satisfied that the respondents had been served with a hearing notice through an advertisement in the Standard Newspaper, I set down the appeal for judgment on 27/5/2019. I was however not able to render the judgment on 27/5/2019 because I was out of the Station attending a meeting of the Judiciary Transport Policy Committee in Naivasha.

5. The appellant submitted that the trial court dismissed the appellant's suit on three grounds: (i) that there was a likelihood of double allocation of the suit property; (ii) that the City Council ought to have been made a party to the suit; and (iii) that the suit property was valued at more than Kshs 5,000,000. He faulted the trial court on the ground that the hearing was ex-parte and there was no controverting evidence against the evidence presented by the appellant. He added that there was no evidence on the issue of value of the suit property. Lastly, he submitted that there was no legal requirement for joinder of the City Council of Nairobi as a party to the suit.

Analysis and Determination

6. I have perused the entire record of the trial court. I have also examined the impugned judgment and considered both the grounds of appeal and the appellant's submissions. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions. In so doing, the appellate court is required to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified. It is also a settled principle of law that the appellate court will ordinarily not interfere with findings of fact by the trial court unless they were not based on evidence or were based on a misapprehension of evidence or it is demonstrated that the trial court proceeded on wrong principles in reaching its conclusion.

7. The trial court has been faulted on three major grounds which I have carefully considered. The suit before the trial court proceeded ex-parte. Only the appellant gave evidence and tendered exhibits. That evidence was not evidentially controverted. Secondly, the issue of value of the suit property and pecuniary jurisdiction of the court was not canvassed before the trial court. It was therefore wrong for the learned magistrate to speculate on the probable value of the suit property and proceed to strike out the suit on the basis of the probable value of the suit property in the absence of evidence relating to the value of the suit property. I similarly agree with the appellant that non-joinder of the City Council of Nairobi was not a proper basis for striking out the suit. The appellant had elected not to sue the City Council because there was no cause of action against the Council. In my view, it was not mandatory that the appellant joined the Council as a defendant.

8. The learned magistrate's holding that it was in public domain that double allocations were common was conjectural. What was before the court was a specific dispute. No other set of ownership documents had been presented to the court to inform that conclusion. The totality of the foregoing is that the learned trial magistrate wrongly struck out the appellant's suit.

9. Equally significant in this appeal, though not raised by the appellant, was the trial court's decision to render a judgment in which it struck out the suit as opposed to dismissing the suit. An order striking out a suit ensues when a suit is terminated by the court without delving into the merits of the parties' respective substantive cases. Where a case is heard and determined on merits, what ensues is a dismissal order. In my view, the striking out order was misplaced.

10. In light of the foregoing reasons, I will set aside the trial court's order striking out the suit and direct that the suit be reinstated and heard afresh by a different magistrate. In the event that the value of the suit property has since appreciated beyond the current pecuniary jurisdiction of the Chief Magistrate Court, parties will be at liberty to bring a miscellaneous application for a transfer order.

11. Lastly, the record of the trial court shows that on 18/2/2009 the firm of Ondieki & Ondieki Advocates filed a notice of appointment dated 17/2/2009 indicating that they had been appointed to act for the defendants. The said notice was marked for service upon M/s Kibatia & Co. Advocates. The trial court subsequently proceeded to hear the suit ex-parte on the basis of an affidavit of service sworn by Edward Njuguna Kihara which indicated that the appellant had served a hearing notice on Felista Muiruri on behalf of all the defendants. This, in my view, was wrong because there was a firm of advocates on record for the defendants. The irregular purported service might be the reason why the respondents did not attend court at the hearing.

Disposal Orders

12. Consequently, I issue the following disposal orders in relation to this appeal:

a) The Judgment of the Senior Principal Magistrate court delivered on 30/1/2015 in Milimani Commercial Courts CMCCC Number 8378 of 2007 striking out the suit is hereby set aside.

b) The said suit shall be placed before a different magistrate for hearing afresh.

c) In the event that the value of the suit property has since appreciated beyond the pecuniary jurisdiction of the Chief Magistrate Court, any of the parties shall be at liberty to initiate a miscellaneous application in the Environment and Land Court for transfer of the suit.

d) Each party shall bear own costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JUNE 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Kimani for the respondents

Court clerk - June Nafula