REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

HIGH COURT CIVIL APPEAL No. 94 OF 2015

ESTHER MUTHONI

FRANCIS NDIRITU KARIUKI.....APPELLANTS

VERSUS

JOSEPH MWANGI KIRARI.....RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at

Nakuru (Hon. S. M. Mungai, Chief Magistrate) delivered on 8th July 2015 in Nakuru

CMCC No. 541 of 2005 Joseph Mwangi Kirari v Esther Muthoni & Francis Ndiritu Kariuki)

JUDGMENT

1. This appeal traces its roots to a plaint dated 1st April 2005 which was filed in the subordinate court by the respondent herein. He later filed an Amended plaint dated 10th March 2011. He averred in the amended plaint that the 1st appellant was his former wife and that she later got married to the 2nd appellant. He added that the parcel of land initially known as Maombi Plot No. 620 but whose description later changed to LR Kabazi/Munanda Block 2/273 (Maombi Ona) (hereinafter 'the suit property') was at all material times in his possession and that he had bought it when the 1st appellant was his wife and had it registered in her name to hold it in trust for him. Further that pursuant to an agreement dated 10th November 2001 the 1st appellant admitted the trust and agreed to transfer the suit property to him. That the 1st appellant later changed her mind and refused to complete the transfer.

2. The respondent therefore sought judgment against the appellants jointly and severally for:

> *(a) A declaration that the plaintiff is the lawful owner of all that piece of land known as Plot No. 620 now known as L.R Kabazi/Munanda Block 2/273(Maombi Ona)*
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> *(b) An order compelling the first defendant to transfer all that piece of land known as Maombi Plot No. 620 now known as L.R Kabazi/Munanda Block 2/273(Maombi Ona) to the plaintiff failing which the executive officer be authorized to sign transfer forms in respect of all that piece of land known as LR plot No. 620 now known as Kabazi/Munanda Block 2/273(Maombi Ona)*
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> *(c) Costs of this suit*
>
> *(d) Interest on (c)*
>
> *(e) Such further relief that this honourable court may deem fit to grant.*

3. The appellants filed a defence and counterclaim in which besides generally denying the other averments in the plaint, they admitted that the 1st appellant was the respondent's former wife and that the 1st appellant later got married to the 2nd appellant. They added that the respondent obtained sale and transfer of the suit property from the 1st appellant by force, fraud and coercion and that consequently, the agreement is no enforceable. They thus prayed for dismissal of the respondent's suit and for judgment against the respondent for a permanent injunction restraining the respondent from interfering with the 1st appellant's ownership and possession of the suit property, costs and interest.

4. Upon hearing the case, the subordinate court (Hon. S. M. Mungai, Chief Magistrate) delivered judgment on 8th July 2015 dismissing the counterclaim with costs and entering judgment for the respondent as pleaded at prayers (a) and (b) of the plaint (see paragraph 2 of this judgment) with costs.

5. Being aggrieved by the above decision, the appellants filed the present appeal in the High Court. Although the appeal was later transferred to this court, it was not given an ELC appeal number. The grounds of appeal as stated in the Memorandum of Appeal are:

> 1. *THAT the learned trial magistrate erred in law and fact in entering judgment in favour of the Respondent herein when there were no sufficient grounds for such judgment.*
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> 2. *THAT the learned trial magistrate erred in law and fact in refusing to consider the substantial issues raised by the appellants in their evidence and submissions.*
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> 3. *THAT the learned trial magistrate dismissed the appellants counter claim without any basis and or justification at all.*
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> 4. *THAT the learned trial magistrate erred in law and fact when he held that the 1st appellant has done nothing to reclaim the (sic) when she had a counter-claim before him and further the parties had engaged in litigation over the property for a long time.*
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> 5. *THAT the learned trial magistrate erred in law and fact in presuming marriage between the 1st appellant and the respondent despite there being no evidence to that effect.*
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> 6. *THAT the learned trial magistrate considered extraneous circumstances in his judgment and arrived on a wrong decision.*
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> 7. *THAT the learned trial magistrate erred in law and fact in failing to consider the issue of duress pleaded by the appellants herein just a day before their wedding that resulted into the alleged agreement and transfer of the suit land.*
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> 8. *THAT the learned trial magistrate erred in law and fact in failing to appreciate the evidence by the 1st appellant and proof of purchase of the suit land.*
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> 9. *THAT the learned trial magistrate was unfair and biased and arrived on the judgment without considering the evidence and the applicable law.*
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> 10. *THAT the learned trial magistrate erred in law and fact in finding that because the appellants did not evict the respondent from the suit land they had no valid interests on the land despite evidence that there were various suits between the parties over a long period of time over the same subject matter.*
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> 11. *THAT the learned trial magistrate erred in law and fact in failing to consider that the 1st appellant had been in possession and occupation of the suit land prior to the filing of the suit.*
>
> 12. *THAT the entire judgment was arrived at without proper consideration of law and fact.*
>
> 13. *THAT the entire judgment is oppressive to the appellant and should be set aside entirely.*

6. The appellants therefore urged this court to set aside the judgment of the subordinate court, to dismiss the respondent's suit and to enter judgment for them as prayed in their counterclaim.

7. The appeal was canvassed through written submissions. Both sides filed and exchanged submissions. I have carefully considered the memorandum of appeal, the entire record and the submissions.

8. This is a first appeal. This court therefore has a duty to re-evaluate the material that was before the subordinate court and draw its own independent conclusions. The principles applicable while considering such an appeal were stated in **Selle v Associated Motor Boat Co. & others [1968] E.A. 123** as follows:

> ***An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270).***

9. In their submissions, the appellants condensed their grounds of appeal to three areas: presumption of marriage, duress and possession of the suit property prior to filing of the suit in the subordinate court. I too will consider the appeal along those three headings. Regarding presumption of marriage, the appellants submitted that the learned magistrate presumed marriage between the 1st appellant and the respondent without any evidence to support it. Citing the case of **Julius Mwangi Muniu & another v Lucy Wanjiru Njogu & another [2016] eKLR**, it was argued that the requirements of a Kikuyu customary marriage had not been established. Further, it was argued that the learned magistrate ought to have divided the suit property between the 1st appellant and the respondent in accordance with **section 7** of the **Matrimonial Property Act No. 49 of 2013**. The respondent's answer to these submissions was simply that the issue of marriage was settled

before trial since it was admitted by the appellants.

10. It is settled law that parties are bound by their pleadings. Any evidence at variance with the pleadings is for rejection. In **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** the Supreme Court stated as follows:

> ***In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…***

11. I have perused both the original plaint as well as the amended plaint herein. The respondent averred at paragraph 4 of the original plaint and at paragraph 4 of the amended plaint that **"The first defendant was the former wife of the plaintiff and at the material time to this suit married to the second defendant."** This averment was admitted in both the original defence filed on 28th April 2005 and in the amended defence and counterclaim filed over a year later. It is thus abundantly clear that it was settled long before trial that the 1st appellant and the respondent were married prior to 10th November 2001. This is also in line with the position taken in the agreement dated 10th November 2001. Ultimately, the learned magistrate cannot be faulted in how he handled the issue of the marriage.

12. On duress, the appellants submitted that the agreement dated 10th November 2001 was executed through coercion and duress on the day of their wedding. Citing the case of **Benedict Ngula Nguli v Gedion Nduva Mwendo & another [2009] eKLR**, they argued that the agreement is not binding. On his part, the respondent countered that there was no duress and that if there was any the 1st appellant ought to have sought nullification of the agreement dated 10th November 2001 and the transfer forms.

13. While there is no dispute that the appellants had a wedding scheduled for 10th November 2001 and that they were served with an order issued on 9th November 2001 in **Nakuru CMCC No. 2224 of 2001** stopping the marriage, the whole issue of duress must be looked at more widely. In particular, the 1st appellant's reaction to the alleged coercive conduct is instructive. The Court of Appeal discussed the concept of duress in **John Mburu v Consolidated Bank of Kenya [2018] eKLR** as follows:

> ***… The definition of duress was given in the case of Ghandhi & Another vs Ruda (1986) KLR 556, as follows:***
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> ***"Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e, threats calculated to produce fear of loss of life or bodily harm. The threat must be illegal in the sense that it must be a threat to commit a crime or tort."***
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> ***A threat to sue for a civil wrong, for example, is not as a general rule, voidable for duress.***
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> ***28. But there is also economic duress which was discussed by this Court in Kenya Commercial Bank Limited & Another vs Samuel Kamau Macharia & 2 Others [2008] eKLR. The court cited with approval the decision of the Privy Council in Pao & Others vs Lau Yiu & Another [1979] 3 ALL E.R. 65, stating thus:***
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> ***"Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree...that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law be regarded as a coercion of his will, so as to vitiate his consent.....In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it".***
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> ***29. Tunoi, JA (as he then was) examined American authorities on the subject and stated:***
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> ***"A keen study of decisions on economic duress shows that American judges pay great attention to such evidential matters as the fact or absence of protest, the benefit received and the speed with which the victim has sought to avoid the contract."***
>
> ***30. Applying those principles to the case before us, it is clear to us that the appellant did not establish a case of duress. To begin with, the letters on record written by the appellant in appreciation of the bank's indulgence persuade us that the environment was conducive to amicable negotiations. The feigned claim by the appellant that the letters were not meant to convey amity was a lame one and we reject it. The appellant was also well advised by legal counsel and has not expressed any deficiency in the legal advice he received throughout. It is conceded that the negotiations were not carried out on a "without prejudice" basis as a cautious party would have been advised to do. He also had an alternative remedy and if he wanted to, could have filed suit against the bank long before the negotiations.***

14. On this issue of alleged duress, the learned magistrate correctly observed as follows:

> ***26. Assuming for a minute that he defendants were coerced by the plaintiff to refund the "non-existent" dowry and to sign the transfer forms of the suit land as deponed in the defence pleaded by the 1st defendant in CMCC No. 2224/2001 (P. exhibit 7) the logical thing which both ought to have done was to pursue that case to its logical conclusion and invite the court to order the refund of the dowry and to declare the said signing of the transfer forms void. They did not do so and even the case which the 2nd***

defendant instituted for the refund of the money which he paid was terminated in inexplicable circumstances.

15. Although it is tempting to use proximity of the wedding as well as the injunctive order as a basis to claim that there was duress, the 1st appellant's conduct shows otherwise. She never sought nullification of the agreement and the transfer form. Claims of duress made in the matter before the learned magistrate came about 4 years after the agreement and transfer were executed. That does not demonstrate a victim speedily seeking to avoid a coerced contract. Even then, no suit seeking nullification of the agreement was pending as at the time of trial in the subordinate court. For the foregoing reasons, I find that no duress had been demonstrated.

16. Finally regarding the heading of possession of the suit property prior to filing of the suit in the subordinate court, the appellants faulted the learned magistrate for holding that they made no efforts to evict the respondent. They submitted that the 1st appellant could not have evicted the respondent since she had been using the suit property prior to the year 2005 when the subordinate court case was filed and she also had title. The learned magistrate observed on this issue as follows:

> ***24.The disinterest and the casual manner of the defendants' conduct towards the occupation of the suit land raises more questions than it answers since ordinarily one would have expected the 1st defendant to take immediate steps to repossess the shamba by having the plaintiff evicted once their " friendship" ended. …***
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> ***28. Looking at the evidence in totality it is common ground that it is the plaintiff who had lived uninterrupted on the suit land. No effort has ever been made by the defendants to have him evicted which conduct tend to corroborate the plaintiff's evidence which boils down to the fact that he purchased the land but had it registered in the names of the 1st defendant who was living with him on the said land as his third wife before she deserted him and the home. I am satisfied that on the balance the plaintiff's evidence on what transpired is the more reliable and convincing compared to that of the defendant. It explains the conduct of the defendants towards the suit land and their inertia on top of the fact that it is the plaintiff who eventually moved and instituted this suit to ratify his ownership legally.***

17. Once again, the magistrate cannot be faulted. He analysed the evidence properly and reached the correct conclusion in this aspect of the matter. The record indicates that the respondent stated in his evidence in chief that he took possession of the suit property upon purchasing it in 1987 and that he remained in possession even as at the date of his testimony. He detailed his activities on the property as growing maize, beans and potatoes. These assertions are consistent with the averments at paragraph 5 of the plaint and were not shaken in cross examination or by any convincing evidence from the appellants. Further, I have perused the original record of the subordinate court and I note that on 4th November 2015 parties recorded a consent order in which the appellants were granted stay of execution pending hearing and determination of this appeal. One limb of that order states: **"The plaintiff/respondent to <u>continue</u> in possession of the suit premises until the hearing and determination of the civil appeal."** This once again confirms the fact of the respondent's possession.

18. In view of the foregoing discussion, I find no merit in the appeal. It is dismissed with costs to the respondent.

Dated, signed and delivered in open court at Nakuru this 18th day of September 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Waiganjo for the appellants

No appearance for the respondent

Court Assistants: Beatrice & Lotkomoi