



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. APPEAL NO. 4 OF 2017

MATHEW KARIUKI AMOS.....APPELLANT

VERSUS

1. JOSEPH KARIUKI NJIRU

2. WYLIFF NTHIGA NJERU

3. GERALD MUGENDI NDWIGA

4. SALESIO KINYUA NJAGI.....RESPONDENTS

(Being an appeal from the Judgement and decree of Hon. R.O. Oigara (PM))

delivered on 8.2.2017 in Embu CMCC No. 119 of 2006)

JUDGEMENT

1. This appeal arises from the judgement and decree of the Hon. R.O. Oigara (PM) dated 8th February 2017 in *Embu CMCC No. 119 of 2006*. By the said judgement the trial court allowed the Respondents' suit against the Appellant for removal of a caution. The Appellant was also condemned to pay the costs of the suit.

2. By a plaint dated 3rd July 2006 the Respondents sued the Appellant seeking an order for removal of a caution lodged by the Appellant against Title No. Kagaari/Kanja/5995 (hereafter parcel 5995). It was their case that they had purchased various portions of land from the legal owner of parcel 5995 and complied with all statutory requirements attendant to such process.

3. They pleaded that the consent of the relevant Land Control Board had been obtained and that when they lodged their transfer documents at the relevant Registry they could not be registered due to a caution lodged by the Appellant claiming a beneficiary's interest. It was their contention that the Appellant was a stranger to the sale transactions and that he had no legal right to lodge the caution.

4. The Appellant filed a written statement of defence in person dated 25th August 2006 in which he denied knowledge of the sale transactions. He pleaded that he was the son of the registered owner of parcel 5995 which was 'family land'. He pleaded that if the said property were to be sold the family would be rendered homeless. He further pleaded that he had a duty as a beneficial owner to lodge the caution in order to protect family land.

5. The material on record indicates that when the suit came up for trial before the Hon. R.O. Oigara, the advocates for the parties consented to have the suit disposed of on the basis of the witness statements and documents on record. They also agreed to file their respective written submissions before delivery of judgement. Consequently, no oral evidence was tendered at the trial and no witnesses were cross-examined.

6. In a brief judgement dated 8th March 2017 the learned trial magistrate found for the Respondents and allowed their prayer for removal of the caution. Although the reasons for the decision are not very clear from the judgement, it would appear that the trial court was not satisfied that the Appellant had proved that he had a legally protected interest in parcel 5995. The trial court was not satisfied that the Appellant had proved the existence of a customary trust either.

7. Being aggrieved by the said judgement, the Appellant filed a memorandum of appeal dated 22nd February 2017 raising the following grounds of appeal:

- a) *The learned trial magistrate erred in law and in fact in reaching a judgement which was not supported by the evidence on record and failing to consider the evidence adduced by the Appellant and his witnesses.*
- b) *The learned trial magistrate erred in law and in fact in failing to appreciate the Appellant's beneficial interest in land parcel No. Kagaari/Kanja/5995 as provided for under section 28 (b) and section 71 (1) (a) of the Land Registration Act 2012.*
- c) *The learned trial magistrate erred in law and in fact by failing to appreciate the law as outlined in the Appellant's authority which was attached to his submissions.*
- d) *The learned trial magistrate erred in law and in fact in reaching a judgement outside the agreed contested issues by the parties.*
- e) *The learned trial magistrate erred in law and in fact in deciding this case in favour of the Respondents yet they lacked locus standi even to file the suit against the Appellant.*
- f) *The trial magistrate erred in law and in fact in failing to appreciate the Appellant's case that he was a beneficial owner to land parcel No. Kagaari/Kanja/5995 and that the registered owner Amos Nyaga Gatemovi was only registered as a trustee as the land was ancestral land.*
- g) *The learned trial magistrate erred in law and in fact in relying on the Respondents documents which had various discrepancies that made them incredible.*
- h) *The learned trial magistrate erred in law and in fact by dismissing the Appellant's suit with costs to the Respondents whereas indeed the Appellant had proved his case based on agreed contested issues on a balance of probability.*

8. The record shows that on or about 17th December 2018 the advocates for the parties appeared before the Deputy Registrar whereby they consented to canvass the appeal through written submissions. The record further shows that the Appellant filed his written submissions on 18th January 2019 whereas the Respondents filed theirs on 22nd February 2019. The parties then appeared before me on 28th May 2019 to take a date for judgement.

9. The court is aware of its duty as a first appellate court. It has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court in a first appeal were summarized in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others [1968] EA. 123** at page 126 as follows;

“...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 that 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 on the demeanor of a witness is inconsistent with the evidence in the case generally.”

10. Similarly, in the case of **Peters Vs Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P.** rendered the applicable principles as follows;

“...It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

11. In the same case, **Sir Kenneth O'Connor** quoted **Viscount Simon, L.C in Watt Vs Thomas [1947] A.C 424** at page 429-430 as follows;

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

12. The court has considered and re-evaluated the entire evidence on record in this matter. The court has also considered the judgement of

the trial court, the grounds of appeal raised by the Appellant, as well as the written submissions filed by the parties.

13. Although the Appellant has framed 8 grounds of appeal, the court is of the opinion that there are essentially 3 main grounds in this appeal. There is an overlap in some of the grounds set out in the memorandum of appeal. The 1st, 2nd, 3rd, 6th, 7th and 8th grounds of appeal challenge the trial courts evaluation of the evidence and the resultant findings. The net effect is really whether or not the Appellant had established a legal interest in parcel 5995 which could be protected by a caution. The 4th and 5th grounds of appeal shall be dealt with separately.

14. In the opinion of the court the three main issues in this appeal may be rendered as follows:

- a) *Whether the trial court erred in failing to hold that the Appellant had no legal interest in parcel 5995 which could be protected by a caution.*
- b) *Whether the trial court erred in law in basing its judgement on issues outside the agreed contested issues.*
- c) *Whether the trial court erred in law in failing to hold that the Respondents had no locus standi to file the suit.*

15. The court has considered the evidence on record as well as the respective written submissions of the parties on the first issue. The Appellant's contention is that there was adequate evidence on record for the trial court to find and hold that the Appellant had a legal or beneficial interest in the suit property which could be protected by a caution. The nature of the interest was said to be an overriding interest or a customary law trust.

16. The Appellant cited various authorities for the proposition that customary law trust can be established by leading evidence on the history of the property in dispute and the applicable customary law. The Appellant cited the cases of **Njenga Chogara V Maria Wanjira Kimani & 2 Others [2005] eKLR** and **Muthuita V Muthuita [1982-88] 1 KLR 42** among other decisions.

17. The Appellant further submitted that customary trusts are recognized in our statutes under **Sections 25 and 28 of the Land Registration Act, 2012. Section 25(2)** of the said Act provides that the registration of a person as proprietor does not relieve him of any obligation he may have as a trustee whereas **Section 28** recognizes trusts including customary trusts as overriding interests which do not require to be noted in the register.

18. The Respondents' counsel submitted that the Appellant's beneficial interest in the suit property was inchoate since it could only accrue upon the death of his father who was the owner of the suit property. He cited the case of **Marigi V Muriuki & 2 Others [2008] 1 KLR (G & F) 1073** in support of that proposition. It was further submitted that, in any event, the Appellant had failed to plead and prove the particular customary law on the basis of which a customary trust could be established.

19. The court has analyzed and re-evaluated the pleadings and the entire evidence in this matter. The issue of customary law trust or overriding interest was never pleaded in the Appellant's defence dated 25th August 2006. It was never pleaded that the suit property was ancestral land or clan land subject to any customary trust. The Appellant's defence before the trial court was simply that he was a son of the registered owner; that the suit property was family land; and as such he was a beneficial owner who was out to protect family property through a caution. There were no particulars of trust which were pleaded. No particulars of the customs or applicable customary law were pleaded.

20. As was held in **Odd Jobs Vs Mubia [1970] EA 476**, **Vyas Industries Ltd Vs Diocese of Meru [1982] KLR 114** and **Galaxy Paints Co. Ltd Vs Falcon Guards Ltd [2000] 2 EA 385**, a court of law should not base its decision upon an unpleaded issue. In the case of **Galaxy Paints Co. Ltd Vs Falcon Guards Ltd (supra)** the court held *inter alia*, that;

“It is trite law, and provisions of Order XIV of the Civil Procedure Rules are clear that issues for determination in a suit generally flow from the pleadings and, unless pleadings are amended in accordance with provisions of the Civil Procedure Rules, the trial court by dint of the provisions of Order XX Rule 4 of the aforesaid rules may only pronounce judgement on the issues arising from the pleadings or such issues as the parties framed for the court's determination.”

In Gandy Vs Caspair [1956] EACA 139, it was held that unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute clearly amounts to an error on the face of the record...”

21. The court is of the opinion that the Appellant's defence of a customary trust or overriding interest was not pleaded in his defence. In those circumstances, the Appellant ought not to have been allowed to tender any evidence before the trial court in order to prove the unpleaded issue. Any evidence tendered towards establishing an unpleaded issue is not admissible. So, even though a party can prove the existence of a customary trust by leading evidence on the history of the land and the applicable African customary law, such evidence is only admissible if the issue sought to be proved was pleaded in the first instance. Consequently, the court finds no merit in the Appellant's complaint that the trial court erred in holding that he had failed to establish a legal interest in the suit property capable of being protected by caution under **section 71 of the Land Registration Act, 2012.**

22. The second issue is whether the trial court reached its decision outside the agreed contested issues. The court has noted from the material on record that the parties did not file an agreed statement of issues before the trial court. It was left to the trial court to frame the issues for determination in accordance with the provisions of **Order 15 Rule 2 of the Civil Procedure Rules.** Even though the issues were not meticulously drawn, the judgement of the trial court indicates that the 5 or so issues framed all emanated from the pleadings on record. The Appellant has not pointed out any specific issue which was framed by the trial court outside the pleadings or documents of the parties.

23. The 3rd issue is whether the trial court erred in failing to hold that the Respondents had no *locus standi* to file the suit in the first place. It was the Appellant's submission before the trial court that the Respondents had no right to seek removal of the caution on the suit property because they were not yet registered as proprietors thereof. It was contended that only a registered proprietor could apply for removal of a caution. The court is unable to agree with that submission. The material on record shows that it was the Appellant's father who sold the suit property to the Respondents, obtained consent of the Land Control Board and signed the relevant transfer forms to facilitate their registration as proprietors. The only reason why the Respondents could not obtain registration was because of the caution lodged by the Appellant.

24. The court is of the opinion that the Respondents undoubtedly had a purchasers' interest in the suit property. That is a legal interest on the basis of which they could either seek registration of their own caution or removal of a subsisting caution. The court agrees with the Respondents' submissions on this issue and the judicial pronouncement in the case of **Church of Kenya Mbeere Diocese V The Rev. David Waweru Njoroge Nyeri CM Appeal No. 108 of 2002.**

25. The court has noted that the Appellant has raised additional grounds in page 12 of his written submissions most of which were never contained in the pleadings before the trial court and the memorandum of appeal. The court shall not consider them or make any pronouncements thereon.

26. The upshot of the foregoing is that the court finds no merit in the appeal. All the grounds of appeal are rejected with the consequence that the appeal is hereby dismissed with costs to the Respondents.

27. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 31ST DAY of OCTOBER, 2019

In the presence of Mr. Morris Njagi for the Respondents and in the absence of the Appellant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

31.10.19