



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C.A. CASE NO. 11 OF 2015

NJIRU KATHAMBO.....APPELLANT

VERSUS

PAUL CHARLES LUKAS KATHAMBO Alias

MWANIKI KATHAMBO NJERU.....RESPONDENT

(Being an appeal from the Judgement and Decree of Hon. S.M. Mokuia (SPM) dated 22nd March 2012 in Siakago SPMCC No. 39 of 2008).

JUDGEMENT

1. This appeal arises from the judgement and decree of the Hon. S.M. Mokuia (SPM) dated 22nd March 2012 in *Siakago SPMCC No. 39 of 2008*. By the said judgement, the trial court dismissed the Appellants' suit against the Respondent with costs.
2. The material on record shows that the Appellant and the Respondent are blood brothers. By his plaint dated 2nd November 2008 and amended on 29th March 2010, the Appellant pleaded that *Title No. Mbeti/Kiamuringa/176* (hereafter *parcel 176*) originally belonged to their late father, Paul Njiru Kathambi. It was further pleaded that the Respondent had fraudulently caused their father's name to be removed from the register and replaced with his own name.
3. The Appellant further pleaded that the Respondent had proceeded to sub divide parcel 176 into two parcels namely *Title No. Mbeti/Kiamuringa/2013 & 2014* (hereafter *parcel Nos. 2013 and 2014 respectively*). The main prayer in the amended plaint was an order for parcel 176 to be sub-divided equally between the Appellant and the Respondent.
4. By his defence dated 29th October 2008 and amended on 8th April 2010, the Respondent denied the Appellant's claim in its entirety and put him to strict proof thereof. It was denied that their late father was ever registered as proprietor of parcel 176. The Respondent denied having fraudulently acquired parcel 176 or having caused their father's name to be removed from the land register. The Respondent stated that at all material times he was known as Paul Charles Lukas Kathambo.
5. The record shows that upon a full hearing of the suit, the trial court delivered its judgment on 22nd March 2012 dismissing the Appellant's suit with costs. The trial court held that the Appellant had failed to prove his case on a balance of probabilities. In particular, the court held that the Appellant had failed to demonstrate that parcel 176 was ever registered in the name of his father. The court also held that it could not imply any trust in favour of the Appellant in the circumstances of the case.
6. Being aggrieved by the said judgement, the Appellant filed a memorandum of appeal dated 23rd April 2012 raising the following grounds of appeal:
 - a. *That the honourable learned magistrate erred and misdirected himself in law by basing his findings on facts which had neither been pleaded nor proved by evidence.*
 - b. *That the honourable learned magistrate erred and misdirected himself in law when he made a judgment void of reasons.*
 - c. *That the learned magistrate erred in law and fact by holding that the Respondent had obtained the Title documents honestly when there was overwhelming evidence to the contrary.*
 - d. *That the honourable magistrate erred and misdirected himself by relying on facts pleaded in the Respondent's defense without considering whether such facts had been proved by way of evidence.*

e. *That the learned magistrate erred and misdirected himself when he awarded the Defendant costs of the suit and dismissed the Plaintiff's claim.*

f. *That the learned magistrate erred and misdirected himself when he failed to apply the well-known principles of law in arriving at his decision.*

g. *That the learned honourable magistrate erred and misdirected himself when he ordered the Defendant to pay costs and interest.*

7. When the appeal was listed for directions on 24th September 2018 before the Deputy Registrar, it was directed that the appeal shall be canvassed through written submissions. The parties were also directed to file their respective submissions within 30 days. The record, however, shows that the Appellant filed his submissions on 19th July 2019 whereas the Respondent filed his on 22nd November 2019.

8. 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.”

9. 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...”

10. 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.”

11. 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 as well as the grounds of appeal raised by the Appellant.

12. Although the Appellant raised 7 grounds of appeal some of the grounds overlap into each other. The court is of opinion that those grounds can be condensed into the following 3 grounds:

a. *Whether the trial court erred in law in basing its judgement on an issue which was not pleaded by the parties.*

b. *Whether the trial court erred in its evaluation of the evidence and the law and as a result arrived at a wrong decision.*

c. *Whether the trial court erred in law in awarding costs of the suit to the Respondent.*

13. The Appellant's advocate submitted at length on the first issue. It was contended that the trial court erred in basing its judgement on an unpleaded issue of trust. It was contended that none of the parties had raised the question of trust in their respective pleadings. It was also contended that no evidence was led on the issue of trust hence it ought not to have been incorporated amongst the issues for determination.

14. The court is aware that as a general rule, a court ought not to base its judgement on an issue which was neither pleaded nor canvassed by

the parties unless it falls within the exceptions stated in the case of **Odd Jobs V Mubia [1970] EA 476**. For instance, in the case of **Galaxy Paints Co. Ltd V Falcon Guards Ltd [2002] 2 EA. 385** it was 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...”

15. The court has perused the judgement of the trial court. The court did not clearly set out the issues for determination and the decision made thereon on each of the issues. The preparation of a judgement should be guided by the provisions of **Order 21 Rule 4 of the Civil Procedure Rules** which stipulate as follows:

“Judgements in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision”

16. It is evident that the judgement of the trial court did not fully comply with the provisions of **Order 21 Rule 4 of the Rules** hence the confusion which is evident in the body of the judgement. It would appear that the question of trust was determined by the trial court whereas it was not pleaded by any of the parties in their pleadings. The mere fact that the Appellant may have alluded to it, in passing, at the trial could not make it a legitimate issue for determination in the suit. Consequently, the court agrees with the Appellant that the trial court erred in framing and making a determination on an issue which was not pleaded by any of the parties.

17. The second issue is whether the trial court erred in its evaluation of the evidence and the law and as a consequence reached a wrong decision. There is no doubt that the Appellant’s case before the trial court was solely based upon alleged fraud on the part of the Respondent. The particulars of fraud alleged that the Respondent had caused the name of their father to be removed from the register and replaced with his own.

18. It has been held that alleging fraud against a person is a serious matter. The party alleging must plead with specificity the particulars of fraud. He must also specifically prove those particulars of fraud in order to succeed in his claim. In the case of **Evans Otieno Nyakwara V Cleophas Bwana Ongaro [2015] eKLR** the High Court held, *inter alia*, that:

“In this case, it is the Respondent who filed the defence and counterclaim and alleged that the document relied upon by the Plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay upon the Respondent. As regards the standard of proof, I would do no better than quote Central Bank of Kenya Ltd Vs Trust Bank Ltd and 4 Others Nai Civil Appeal No. 215 of 1996 (UR) where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof was much heavier on the Appellant in this case than in an ordinary civil case”.

19. The main question for determination is whether the Appellant had pleaded the alleged fraud with specificity and proved the requisite particulars of fraud. The court has perused the entire material on record. It is evident that even though the Appellant alleged some fraud on the part of the Respondent, the same was not proved at the trial. In order to succeed on such a claim, the Appellant was bound to prove at least two aspects. First, he was bound to prove that at some point prior to the Respondent’s registration their father was the owner entered in the relevant record as owner of the land. Second, the Appellant was bound to prove that the Respondent was the one responsible for removal of their father’s name from the record.

20. The material on record indicates that the Appellant and his witness woefully failed in tendering evidence to prove the allegation of fraud. None of the witnesses were able to demonstrate that the Appellant’s father ever owned parcel 176 during his lifetime. None was able to demonstrate that his name was ever removed from any record or register. The trial court captured the state of the Appellant’s evidence as follows:

“When the Plaintiff and his witnesses were cross-examined as to whether they had anything to illustrate that land parcel No. Mbeti/Kiamuringa/176 was in the name of their father, they had nothing to show.”

21. The court has noted from the record of proceedings that even the Location Chief who was called by the Appellant to testify on his behalf conceded that he had nothing to demonstrate that parcel 176 was ever registered in the name of the Appellant’s father. In the circumstances, the trial court cannot be faulted for the final decision it reached because it was consistent with the evidence on record. The court’s own analysis and re-evaluation of the evidence on record leads to the inevitable conclusion that the Appellant, indeed, failed to prove the fraud alleged against the Respondent. The mere fact that the trial court erred in considering the issue of trust does not make up for the Appellant’s failure to marshal and tender the evidence which was necessary for the purpose of proving the alleged fraud at the trial.

22. The 3rd issue relates to the award of costs of the action. The Appellant faulted the trial court for awarding the Respondent costs of the suit. It is not clear how the trial court erred in awarding costs to the successful party. The court is aware that costs of an action are at the

discretion of the court and that the general rule is that costs shall follow the event.

23. In the case of **Janmohammed & Sons Ltd Vs Twentsche Overseas Trading Co. Ltd [1967] E.A. 287** it was held that a successful party should normally be awarded costs of the suit and that he should not be deprived of costs except for good cause. The Appellants have not demonstrated any good reason why the Respondent as successful party should have been deprived of costs of the suit. The court is of the view that the trial court exercised its discretion to award costs properly and on well settled principles of law. As was held in **Fazal Dhirani V Mohamed Ibrahim (1946) 13 EACA 69 and Sheikh Jama Vs Dubat Farah [1959] EA 789**, an appellate court should not interfere with the exercise of judicial discretion by the lower court unless such discretion has been exercised unjudicially or on wrong principles. Accordingly, the court finds no merit in this ground of appeal.

24. The court has noted that the Appellant has made an unusual request in his written submissions. The request is for a retrial of the original suit before the magistrate's court. To quote the Appellant's submissions:

“We humbly submit that the Hon. Magistrate erred in law by failing to determine all the issues. We request the court in the interest of justice to call for more evidence from the adjudication office to demonstrate fraud committed by the Respondent.”

25. It is clear from the material on record that no records were availed from the Land Adjudication Office at the trial of the action. The concerned Land Adjudication Officer was never called at the trial to produce any records or to tender oral evidence. Such evidence may have shed light on the alleged fraud. However, none of the parties took steps to have the adjudication records produced at the trial. Ours being an adversarial system of adjudication it was the duty of the Appellant to marshal and present such evidence before the court. The court had no obligation to move *suo motu* and fish for additional evidence to aid any of the parties.

26. The court is of the opinion that the duty of availing evidence from the Adjudication Office at the trial lay with the Appellant. It was his duty because the burden of proof on the issue of fraud lay with him. **Section 107 of the Evidence Act (Cap. 80)** which deals with the burden of proof stipulates as follows:

1) Whoever desires any court to give judgment as to any legal right or

liability dependent on the existence of facts which he asserts must prove that those facts exist.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

27. Similarly, **Section 109** of the said **Act** which deals with the incidence of the burden of proof stipulates as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

28. The court finds no justification whatsoever for the Appellant's request for a re-trial or for additional evidence to be called by the court. The proceedings before the trial court were not irregular or defective. It was not contended that the trial court had no jurisdiction to conduct the trial. The proceedings were regular in every respect save that the Appellant was aggrieved by the judgement and decree of the trial court. A re-trial cannot be ordered simply because the trial court may have erred on a point of law in the judgement if the hearing was conducted in a regular manner. A re-trial cannot be ordered simply to accord one party a chance to look for additional evidence and patch up his case. A re-trial is not designed to accord a party a chance to have a second bite at the cherry.

29. The upshot of the foregoing is that save for the ground concerning the unpleaded issue of trust the court finds no merit in the rest of the grounds of appeal. The trial court's error in determining an unpleaded issue did not, however, occasion a miscarriage of justice since the court has found that the evidence on record was not sufficient to prove the fraud alleged against the Respondent. Accordingly, the Appellant's appeal is hereby dismissed with no order as to costs.

30. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 28TH DAY of NOVEMBER, 2019

In the presence of Ms. Ikere holding brief for Ms. Ndongoro for the Appellant and Ms. Nzekele holding brief for Mr. Okwaro for the Respondent

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

28.11.19