



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

E.L.C.A NO. 9 OF 2016

MONICA NJOKI GATHUMBI.....APPELLANT

VERSUS

GEORGE MUCHIRA GATHUMBI.....RESPONDENT

JUDGMENT

(BEING AN APPEAL FROM THE JUDGMENT AND DECREE OF HON. ANDAYI W. FRANCIS

IN PMCC NO. 299 OF 2013 DELIVERED ON 19TH MAY 2016)

INTRODUCTION

The appellant who was also the plaintiff in the Magistrate's Court Case No. 299 of 2013 (Kerugoya) had instituted a suit vide a plaint dated 22nd October 2013 seeking orders for *inter alia* a declaration that she was the legal owner of land parcel No. KABARE/NGIROCHE/454. The appellant had also sought an order for eviction of the respondent from the suit property. The appellant also wanted the respondent to be restrained permanently from entering, alienating, cultivating, trespassing, or interfering with the plaintiff's right over the suit property in any way whatsoever.

By way of defence and counter-claim, the respondent/defendant denied the plaintiff/appellant's claim and sought judgment for half of share of the suit land parcel No. KABARE/NGIROCHE/454.

After the parties and their witnesses were heard, the trial magistrate dismissed the plaintiff's claim and cancelled the registration of the plaintiff as sole proprietor of the suit land. The trial Court also cancelled the certificate of death for their father issued to the appellant and reinstated the caution that had been registered upon the suit property. The learned trial magistrate equally cancelled the registration of the plaintiff/appellant and Gatumbi Gatonge (deceased) as joint proprietors and ordered the title of the land to revert to the name of the said Gatumbi Gatonge (deceased). The appellant was dissatisfied with the decision by the trial magistrate and filed this Appeal citing the following eight (8) grounds:

- (1) That the learned Chief Magistrate erred in law in assuming jurisdiction over an ELC matter, a jurisdiction he did not have as at the 19th May 2016.***
- (2) The learned Chief Magistrate erred and misdirected himself in law and fact in framing issues unrelated to the pleadings and evidence canvassed by the parties before him.***
- (3) The learned Chief Magistrate erred and misdirected himself in law in ordering cancellation of the plaintiff's registration and title deed; an un-pleaded issue, and therefore made without jurisdiction.***
- (4) The learned Chief Magistrate erred and misdirected himself in ordering the cancellation of a deceased death certificate a matter that was neither pleaded, canvassed or proved before him.***
- (5) The learned Chief Magistrate erred and misdirected himself in ordering reinstatement of a caution, an un-pleaded issue.***
- (6) The learned Chief Magistrate erred and misdirected himself in ordering the registration of a deceased proprietor to the plaintiff's title an issue that had not been pleaded, canvassed or proved before him.***

(7) The learned Chief Magistrate erred and mis-directed himself in advising parties who were not before him to proceed in filing succession proceedings.

(8) The decision and findings of the learned Chief Magistrate were against the law relating to protection of land titles, the burden of proof and the evidence.

When this appeal came up for directions, the parties agreed to canvass this Appeal by way of written submissions.

APPELLANT'S SUBMISSIONS

The appellant referred to ground No. 1 of the Appeal and submitted that the trial before the learned magistrate commenced on 19th February 2014 and was concluded on 12th May 2016 and on 19th May 2015, judgment was delivered. The appellant further submitted that the learned Magistrate was Gazetted on 11th March 2016 vide Gazette Notice No. 1472 dated 1:3:2016 to preside over cases involving disputes relating to Environment and Land. The said Gazette Notice No. 1472 of 1:3:2016 was revoked by the High Court in ***Malindi Petition No. 3 of 2016*** being ***Malindi Law Society Vs The Attorney General and 4 others (2016) e K.L.R.***

It is further submitted that the decision of the High Court was in turn overturned by the Court of Appeal in C.A No. 287 of 2016 reported in (2017) e K.L.R. The end result is that the Gazette Notice No. 1472 of 1:3:2016 was reinstated.

The appellant therefore submitted that the trial magistrate did not have jurisdiction to preside over CMCC No. 299 of 2013 on the day he took it over on the 19th February 2014 to the time the defence closed their case on 10th December 2015. The appellant also argued that the trial magistrate wrote and delivered judgment on 19th May 2016, two (2) months after the Gazettement. It is further submitted that the proceedings on which the judgment were based is a nullity and that the judgment itself was therefore inconsequential.

GROUND 2, 3, 4, 5, 6, 7 & 8

On the other seven grounds, counsel for the appellant submitted that the learned Chief Magistrate erred and misdirected himself on the pleadings, the evidence, the submissions of counsel and the law when he framed the issues for determination. Counsel noted that the learned Chief Magistrate went into error when he drew up the issues alone without reference to the parties as provided for under ***Order II Rule 3 (1) (b) (c) & (e)***. In conclusion, the counsel submitted that the learned Chief Magistrate fell into error by framing and determining issues which were not pleaded or even raised in the documents produced in evidence or submissions by the parties. He therefore seeks orders as prayed in the Appeal.

RESPONDENT'S SUBMISSIONS

The counsel for the respondent submitted that what was before the Court both in the main suit and the counter-claim revolved around land parcel No. KABARE/NGIROCHE/454. The counsel submitted that Hon. Olao transferred the matter to the Chief Magistrate and none of the counsels was of any objection and that should the Court find that the Chief Magistrate did not have the requisite jurisdiction, then the best option is to order a retrial in a Court of competent jurisdiction. The learned counsel further submitted that this being a first appeal, this Court is obligated to go through the record and decide for itself whether the trial Court followed the laid down procedures and the correct law in making its decision. He stated that the trial Court properly directed itself in making its findings on all the issues before it.

ANALYSIS AND DECISION

I have read and considered the respective arguments in the submissions by the parties. As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and thereafter make my own conclusion about it considering that I did not have the benefit of hearing and seeing the witnesses first hand. The duty of the Court in a first appeal such as this one was stated in the case of ***Selle & another Vs Associated Motor Boat Co. Ltd & others (1968) E.A 123*** as follows:

“I accept counsel for the respondent’s proposition that this Court is not bound necessarily to accept the findings of fact by the Court below. 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 consider 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 allowances 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 demeanour of the witness is inconsistent with the evidence in the case generally (AbdulHammed Saif Vs Ali Mohamed Sholan (1955) 22 E.A.C.A 270”.

Again in the case of ***Kenya Power & Lighting Company Ltd Vs E.K.O. & another (2015) e K.L.R.***, Justice Joel Ngugi (As he then was summarized the three binding principles as follows:

“(a) First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions.

(b) In considering and re-evaluating the evidence, the first appellate Court must bear in mind and give due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses testify before her, and

(c) If is not open to the first appellate to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time”.

With the above principles in mind, I now proceed to deal with this appeal.

The first ground of this appeal relates to jurisdiction. It is not in dispute that the Kenya Gazette of the 11th March 2016 contained Notice No. 1472 dated 1:3:2016 which contained the names of the magistrates Gazetted to hear and determine Environment and Land related disputes pursuant to **Section 26 (3) of the ELC Act, 2011**. The names of the magistrates include the name of the Chief

Magistrate who presided over this case as the trial Court. According to the proceedings at page 37 of the record of this appeal, the matter had come before Hon. Mr. Justice Olao B.N. Judge on 23/10/2013 who transferred the case to the Chief Magistrate’s Court (Kerugoya) for hearing on 7/11/2013. However, the matter commenced hearing before the said Chief Magistrate Hon. Andayi W. Francis on the 19th February 2014 and was concluded on 12/5/2016. In a ruling delivered on 11th November 2016, in the case of **Malindi Law Society Vs Attorney General & 4 others (2016) e K.L.R**, a three Judge Bench comprising Hon. Mr. Justice M.J. Anyara Emukule, Hon. Mr. Justice Said J. Chitembwe and Hon. Lady Justice Mugure Thande quashed the said legal Notice No. 1472 of 1:3:2016 published on 11th day of March 2016. By implication, the Superior Court ruled that the Magistrate Courts lacked the requisite jurisdiction to handle Environment and Land related disputes emanating from **Section 162 (2) of the Constitution** of Kenya, 2010. I agree with counsel for the appellant that by quashing the Kenya Gazette of the 11th March 2016 contained in Notice No. 1472 dated 1:3:2016, the Chief Magistrate Hon. Francis Andayi lacked jurisdiction to hear and determine the subject of this appeal between 19/2/2014 and 19/5/2016. It was not until 9th October 2017 when the Court of Appeal reversed the decision by the High Court quashing Gazette Notice No. 1472 dated 1st March 2016 published on 11th March 2016 and 1745 dated 14th March 2016 and published on 18th March 2016 by setting aside.

Since this ground on jurisdiction has succeeded, I need not go into the other grounds. I therefore allow this appeal in the following terms:

(1) The trial Magistrate’s Court file is remitted back for re-trial before any other Magistrate.

(2) Mention before the Chief Magistrate Kerugoya on 26th November 2019 for directions.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 8th day of November, 2019.

E.C.CHERONO

ELC JUDGE

8TH NOVEMBER, 2019

In the presence of:

(1) Mr. Asiimwe holding brief for Morris Njagi

(2) Respondent – absent

(3) Kabuta – Court clerk – present