



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 264 OF 2016

ESTHER NYAGUTHII MURIUKI MATHENGE.....PLAINTIFF

-VERSUS-

PHOEBA MUCHIRI WARUIDEFENDANT

JUDGMENT

1. The plaintiff herein, **Esther Nyaguthii Muriuki Mathenge**, instituted this suit seeking judgment against the defendant, **Phoeba Muchiri Warui**, for:

Revocation, cancellation and or annulment of Title No.Iria-ini Kairia/757 (the suit property) and new title deed be registered under her name absolutely;

b) Costs of the suit and interest.

2. As can be discerned from the plaint filed in this matter, the plaintiff's case against the defendant is that the defendant fraudulently or by misrepresentation of facts caused the suit property to be registered in her name.

3. Through her statement of defence dated **13th December, 2016** and amended on **24th January, 2017**, the defendant gives a detailed account of how she gained interest in the suit property. In particular, she explains that the suit property was bought by her mother from its owner at the time, one Thoithi Mathenge in 1980.

4. Terming the plaintiff's claim an abuse of the process of the court, the defendant explains that some time in or about 1998, the plaintiff registered a boundary dispute in respect of her parcel of land to wit Irai-ini/Kairia 755 and the suit property.

5. It is the defendant's case that after the boundary dispute was determined, it was established that the plaintiff had encroached into the suit property and planted 62 tea bushes thereon.

6. Despite the finding that it is the plaintiff who had encroached on the suit property, in 2007 the defendant purchased the 62 tea bushes which the plaintiff had planted in the suit property.

7. Terming the plaintiff's claim time barred and contending that it discloses no cause of action against her, the defendant explains that she has enjoyed peaceful use and occupation of the suit property since 1980. She has also buried members of her family therein without any objection from the plaintiff.

8. When the matter came up for hearing, the plaintiff abandoned her pleaded claim and instead informed the court that she is not claiming the land but the tea bushes she had paid for.

9. On her part, the defendant informed the court that the suit property was bought by her mother from Thoithi Mathenge (a brother of the plaintiff's husband). She produced the sale agreement in respect of transaction as **Dexbt 1**.

10. After her mother finished paying for the land, the seller took her to the land control board and consent for transfer of the suit property to her was given. Later on, she was issued with a title deed in respect of the suit property.

11. The court heard that the seller asked the defendant to pay for the tea bushes in the suit property, which she did. To prove that fact, the defendant produced the agreements prepared in respect of the payment for the tea bushes as **Dexbt 3 (a)** and **3 (b)**.

12. Later on, she applied for and got issued with a tea growers' licence by KTDA. She produced the licence as **Dexbt 4**.

13. The court heard that the defendant has had quiet use and possession of the suit property and has even buried two of her children in the suit property without objection from the plaintiff.

14. In 2006, the plaintiff claimed that the defendant had trespassed into her parcel of land and called a surveyor to correct the boundaries. The surveyor found that it is the plaintiff who had encroached on her land. The surveyor put beacons in accordance to his findings. As a result she was added some land and 62 tea bushes belonging to the plaintiff.

15. The court heard that both the plaintiff and the defendant were satisfied with the surveyor's determination of the dispute. She paid for the plaintiff's tea bushes. She produced a copy of the agreement executed between her and the plaintiff attesting to that fact as **Dexbt 5**.

16. Explaining that she is not aware of any other tea bushes belonging to the plaintiff which she did not pay for, the defendant urged the court to dismiss the plaintiff's case with costs to her.

Analysis and determination

17. As indicated herein above, the plaintiff filed this suit for revocation, cancellation and or annulment of the title to the suit property on grounds that the title held by the defendant was obtained fraudulently or by misrepresentation. However, during hearing, she abandoned those grounds and instead sought to pursue a claim for payment in respect of what she described as the tea bushes she had paid for.

18. With regard to that claim, it is noteworthy that it was neither pleaded nor supported by the evidence adduced by the plaintiff.

19. It is trite law that parties are bound by their pleadings and to that end the law; in particular **Order 2 Rule 6** prohibits parties to a suit from making an allegation of fact, or raising any new ground of claim, inconsistent with a previous pleading of his. That being the case, the plaintiff who did not plead that the defendant owed her some obligation on account of some tea bushes she took from her is by law prohibited from urging that claim. In that regard see the case of **Dakianga Distributors (K) Ltd v. Kenya Seed Company Ltd** where the Court of Appeal stated as follows concerning pleadings-

“...A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and

present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

Sir Jack Jacob in an article entitled “The Present Importance of Pleadings” published in (1960) Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in Malawi Railways Limited v Nyasulu [1998] MWSO 3 states of the importance of pleadings:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...”

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

In Libyan Arab Uganda Bank for Foreign Trade and Development & Anor v Adam Vassiliadis [1986] UGCA 6 the Court of Appeal of Uganda cited with approval the dictum of Lord Denning in Jones v National Coal Board [1957] 2 QB 55 that:

“In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”

This Court in Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others (supra) cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC SC 91/2002 where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:

“... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

The judges in that case also stated:

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

20. During the hearing of this case, the defendant produced evidence which shows that she lawfully and legally gained interest in the suit property. From that evidence, I agree with the defendant's contention that the suit herein discloses no cause of action against her. Consequently, I dismiss it with costs to the defendant.

21. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 13th day of February, 2018.

L N WAITHAKA

JUDGE

Coram:

Esther Nyaguthii – plaintiff in person

Ms Macharia h/b Lucy Mwai for the defendant

Court assistant - Esther