



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO. 8 OF 2017

PAUL NGUNJIRI WAHOME.....APPELLANT

VERSUS

NANCY WANJIKU NGUNJIRI.....RESPONDENT

Being an appeal against the Ruling of the Honorable senior Resident Magistrate A. B. MONGARE at Nyahururu Principal Magistrate's Court delivered on 25th October 2012

in

PMCC Misc. Application No. 38 of 2011

JUDGEMENT

1. What is before me for determination on Appeal is a matter which was heard and a ruling delivered by A. B. MONGARE SRM in the Principal Magistrate's Court at Nyahururu in Misc. Application No. 38 of 2011 where the learned trial Magistrate, upon hearing counsel on their application by way of Notice of Motion dated the 21st October 2011, delivered her ruling on the 25th October 2012 dismissing the Applicant's Application with costs to the Respondent.

2. The applicant/Appellant, being dissatisfied with the judgment of the trial magistrate has filed the present Appeal before this court.

3. The grounds which the Appellant has raised in his Memorandum of Appeal include:

i. That the learned trial Magistrate erred in law and in fact by considering issues that were extraneous.

ii. That the learned trial magistrate erred in law and in fact in finding that the Respondent had an interest over L.R Nyandarua/Silibwet 23486 and L.R Nyandarua/Silibwet 23487.

iii. That the learned trial magistrate erred in law and in fact in finding that the Respondent contributed to the purchase of L.R Nyandarua/Silibwet 23486 and L.R Nyandarua/Silibwet 23487, the parcels of Land subject of removal of cautions.

iv. That the learned trial magistrate erred in law and in fact in finding that L.R Nyandarua/Silibwet 23486 and L.R Nyandarua/Silibwet 23487 were matrimonial properties.

v. That the learned trial Magistrate erred in law and in fact in failing to make a finding that the Respondent lacked the basis for applying for the registration of the cautions.

vi. That the learned trial Magistrate erred in Law and in fact in failing to hold that there were no justifiable reasons for the cautions over L.R Nyandarua/Silibwet 23486 and L.R Nyandarua/Silibwet 23487 to remain in force.

vii. That the learned trial Magistrate erred in Law and in fact in finding that the issue before her ought to have been settled amicably, whereas it was clear that such attempts had failed.

viii. That the learned trial Magistrate's erred in Law and in fact by dismissing the application dated the 21st October 2011.

4. The Appellant thus sought for;

i. That the learned Magistrate's Ruing delivered 25th October 2012 in Nyahururu Principal Magistrate's Court in Misc. Application No. 38 of 2011 be set aside and an order be issued for removal of the cautions registered on the 26th July 2005 as entry No. 4 on L.R Nyandarua/Silibwet 23486 and L.R Nyandarua/Silibwet 23487.

ii. The respondents be ordered to pay the costs of this appeal and costs in Nyahururu Principal Magistrate's Court in Misc. Application No. 38 of 2011.

5. By the consent, this Appeal was heard by way of written submissions wherein the Appellant filed his submissions on the 7th June 2016 while the Respondents filed her submissions on the 12th February 2018.

6. I have read both submissions and wish to summarize them as follows;

7. The Appellant's submission is to the effect that on the 26th July 2005, the Respondent herein, being the 1st wife to the Appellant caused a caution to be registered on land Parcels L.R Nyandarua/Silibwet 23486 and L.R Nyandarua/Silibwet 23487 claiming licensee interest.

8. That the said cautions were lodged under Section 3 of the repealed Registered Land Act that provides the definition of a licence as;

licence means a permission given by the proprietor of land or a lease which allows the licensee to do some act in relation to the land or the land comprised in the lease which would otherwise be a trespass, but does not include an easement or a profit.

9. That the Respondent had not demonstrated her claim of the licensee or licensee interest but instead had claimed that she had registered the caution by virtue of the fact that the properties herein were matrimonial properties.

10. That by lodging the caution, the Respondent ought to have had a reasonable period to institute matrimonial cause which she never did thus her intention was in bad faith and to encumber the suit properties.

11. That the suit properties were gifted to the Appellant by his father and as such by virtue of being gifts the same could not under the circumstance be regarded as matrimonial properties.

12. For the property to be considered as matrimonial property the same ought to have been obtained by one spouse in the pendency of their marriage as by the provisions of section 93(1) of the Registration Act, the present scenario was different as the suit properties were gifted to the appellant alone and as such they were not acquired or obtained by efforts of either party.

13. That by the trial magistrate ordering the parties to solve the issue amicably by the Appellant transferring to the Respondent some reasonable amount of land equivalent to $\frac{2}{3}$ of the entire portion, was according to the appellant an extraneous decision keeping in mind that that was not in context of the application before the court.

14. The Appeal was opposed by the Respondent who submitted that by the court allowing the Appeal, then it would be allowing the prayers sought in the application dated the 21st July 2011 for the removal of the cautions.

15. That the Appellant approached the court through the wrong forum as the removal of a caution cannot be through the filing of a miscellaneous application. The Appellant ought to have filed a full suit by way of a plaint to enable parties adduce oral evidence before a determination is made. The Respondent relied on the cases of **Hannah Nyambura Gikamu vs. Muchai Karu [2005]eKLR** and **Joseph Kirowen Chemjor vs. William C. Kiseru [2013] eKLR**

16. That further, it was in dispute that parties herein were a couple and had 7 children out of their union, had settled on the suit land and relied on farming thereon for subsistence.

17. That the rights of the Respondent thereof were given full recognition in Section 28 (a) of the Land Registration Act which identified spousal rights over matrimonial property as an overriding interest on all registered Land.

18. That the rights of a spouse were also provided for under Section 93(3) of the Land Registration Act which makes it mandatory for spousal consent to be acquired before any disposition on land held in the names of one spouse is undertaken.

19. That Section 6 of the matrimonial Property Act defines matrimonial property as the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

20. The Respondent explained how the subject suit were acquired in her replying affidavit and as such the subject suit was matrimonial property.

21. Under Article 45 of the Constitution parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. The only way the Respondent could protect her rights was through the registration of the caution as the Appellant intends to deal with the subject suit without her consent.

22. The Respondent prayed for the Appeal to be dismissed.

23. After having regard to the submission by counsel to both parties I find the matter in issue being;

i. Whether the applicant commenced his action appropriately by filing a Miscellaneous Application.

ii. Whether a suit to remove caution can be instituted by way of miscellaneous application

iii. And if not, what orders this court should make.

24. Based on the decided case of **Selle vs. Associated Motor Boat Company Ltd, [1968] EA 123**, this being a first appeal, I am enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and come to my own independent conclusion. The ordinary caution that I should equally bear in mind and make allowance for is the fact that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanor, which is diminished in this Appeal because the hearing took place before the Magistrate.

25. I shall endeavor to analyze and evaluate the case herein afresh.

26. Briefly, the submission put forward in the application dated the 21st October 2011 before A.B Mongare (SRM) was to the effect that the parties herein were a couple. They solemnized their marriage on 16th July 1978 as evidenced by their marriage certificate of serial No. 386185 and were blessed with seven children.

27. That whereas the Appellant herein was the registered proprietor of parcels of land namely L.R Nyandarua/Silibwet 23486 and L.R Nyandarua/Silibwet 23487, on the 26th July 2005, the respondent herein registered a caution on the said pieces of land yet she had no recognizable interest on the same. The Appellant herein then filed the application to have the cautioned removed.

28. The Respondent's response was to the effect that she was the Appellant's legal wife and that the suit property was acquired from the Appellant's father for the benefit of the whole family.

29. That she and her seven children lived on that land and that it was because the Appellant had tried to sell the said subject suit, that she had placed the said cautions on the suit lands to protect her interest which were recognized under section 93 of the Land Registration Act 2012.

30. That the land was acquired through the settlement scheme in which she had contributed in the repayment of the loan through the sale pyrethrum and dairy products. She prayed for 1¹/₂ acres of the suit land to sustain herself and her children.

Analysis and determination:-

31. It is not in dispute that the parties herein are a couple and that the subject suits were given to the Appellant by his father as a gift and subsequently registered in the Appellant's name.

32. It is also not in dispute that the Respondent and her children from their wedlock reside on the said parcels of land and being apprehensive that the Appellant might dispose the same without the Respondent's consent, she registered a caution over the same on the 26th July 2005 to protect her interest.

33. The certificates of official search dated the 5th October 2011 confirm that caution was registered against the title of the suit property in favor of the Respondent.

34. I am satisfied that the Appellant is the registered proprietor of the suit property as he has annexed to his affidavit in support of the application copies of the titles deeds which show that he was registered as the proprietor of the suit properties on 24th March, 1999.

35. Upon the Respondent's action, the Appellant filed a Miscellaneous Application before the Nyahuru Principal Magistrate's Court in Misc. Application No. 38 of 2011 under Section 133(1) of the Registered Land Act, to have the said caution removed, an application that was dismissed, thus giving rise to the present Appeal.

36. Under Order 3 Rule 1 of the Civil Procedure Rules the same requires that:

Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.

37. The "other manner" prescribed in Order 37 is the Originating Summons which may be taken out in respect of matters stipulated in that Rule. The removal of a caution is not however one of the specified 'manner' under the provisions of Order 37.

38. The precursor to the Land Registration Act (LRA) is the Registered Land Act (RLA). Order 37 Rule 8, provides that applications under the Registered Land Act (RLA) other than under Sections 120, 128, 133, 138, 143, and 150 shall be made by originating summons. The removal of cautions under the RLA was contained in Section 133 of the statute. It will be noted that Section 133 is not one of the sections in which applications could be made by way of Originating Summons.

39. The above rule specifically excludes the use of Originating Summons for applications under Section 133 of the Registered Land Act, which is the Section under which the Appellant filed his application for the removal of the Caution.

40. Section 107 of the Land Registration Act, which contains savings and transitional provisions, preserves certain rights which were exercisable immediately prior to the commencement of the said statute. It states as follows :-

(1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

41. Section 133 of the Registered Land Act having been expressly excluded from the use of Originating Summons, the only other way that application could have been made was by way of a Plaint. It could not have been made by way of Notice of Motion.

42. In the case of **Joseph Kibowen Chemjor vs William C. Kisera [2013] eKLR**, Justice Munyao Sila observed as follows;

I am alive to the provisions of Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to technicalities. My view is that the commencement of suit in a manner in which the instituting documents cannot be held to be “pleadings”, goes beyond a mere technicality. It is different where the document filed can be assumed and be regarded as a particular pleading. This probably is the commencement of “suit by a letter” which Mr. Chebii alluded to in his submissions. If framed intelligibly such letter can be regarded as a plaint. However there has to exist special circumstances before such letter can be accepted to be a pleading. Such allowances ought not to be stretched so as to permit counsels to develop a habit of writing letters instead of filing plaints and argue that proceedings can be commenced in whichever way. The purpose of having rules of procedure is to have proceedings controlled in a logical sequence so that justice can be done to all parties. It is incumbent upon parties and counsels to follow the procedures laid out. This of course does not imply that a court has no discretion to permit some sort of deviation especially where the deviation is minimal and no prejudice is caused to the other party.

If I am to allow the current “pleadings” to stand, I do not see how this matter will be determined without prejudice being caused to the defendant. Even if no prejudice will be caused to the defendant I would rather strike out this application at this stage, which will only invite minimal cost, rather than to allow the proceedings to stand, and thereafter be at a loss on how to thereafter proceed with the matter. The former action will benefit all parties and is certainly the lesser of the two evils.

43. I associate myself with these sentiments. Accordingly, I find that the appellant does not have any suit before the court and that the Notice of Motion application dated 21st October, 2011 filed in the lower court on 3rd July, 2013 is fatally defective and was incompetently before the court.

44. This appeal is dismissed, and the application is struck out, and the Orders made in the trial Magistrates Court set aside.

45. The Respondent shall have the costs, both of this appeal, and in the court below.

Dated and delivered at Nyahururu this 18th day of April 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE