



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 1 OF 2015

CLEMENT KIPKEMEI KEINO.....PLAINTIFF

VERSUS

ELIZABETH JEPTOO MOSONG.....DEFENDANT

JUDGMENT

Clement Kipkemei Keino, (hereinafter referred to as the appellant) has come to this court by way of appeal against **Elizabeth Jeptoo Mosong** arising from the judgment made by Hon. A. Alego, Resident Magistrate, dated and delivered on 13.4.2012 and decree dated 7.3.2014 in Eldoret Chief Magistrates Court Civil Case No. 8 of 2011. The genesis of this appeal is a plaint dated 13.1.2011 wherein the appellant averred that he was the registered owner of the suit property being Nandi/Kokwet/380 measuring 5.0 acres or thereabout. That sometimes during the year 2009, he allowed the respondent to temporarily till the said land and that he wanted to take over possession of that land and till it for his own benefits and had notified the respondent to give him vacant possession.

The respondent refused to give vacant possession of the said land and has forcefully continued to stay thereon without the appellant's consent. That he is not in any way related to the respondent customarily or otherwise. The land in question is situated within Nandi North District but it is the Chief Magistrate's Court in Eldoret which is the nearest court with the monetary jurisdiction which reference to the value of the said land being over Kshs. 2,000,000 (Kenya Shillings Two Million only). The appellant prayed for orders compelling the respondent to vacate the suit land and in default, she was to be forcefully evicted at her own costs. He further prayed for costs of the suit.

The respondent filed a counterclaim admitting that the appellant was the registered owner of the suit property but stated that she was entitled to the whole land by virtue of Marriage into the family of the appellant. The respondent case in the lower court was that she has been in occupation and possession of the whole of Nandi/Kokwet/380 for some time with the consent and authority of the plaintiff and that no notice has been issued to her and even if any had been issued the same is ineffectual and inconsequential by virtue of an agreement between the appellant and the respondent among other persons at the time of marriage of the respondent to the appellant's family. The respondent claimed that her occupation and possession had been peaceful and without force of whatsoever nature and that she has been married to the appellant's family under Nandi Customary Law Marriage of Woman to woman Marriage and the appellant fully participated in the said marriage and paid dowry.

The respondent filed a counterclaim averring that she is lawfully on the land and the legal owner of the suit property having been given the same by the family she was married into and has not been divorced from the family and that the appellant's claim was part of a wider machinations to disinherit her of the property thus rendering her and the children of the marriage destitute.

The respondents claim against the appellant was therefore an order compelling the said appellant to transfer the whole of Nandi/Kokwet/380 to the respondent and in default, the court was to execute all documents in place of the appellant to effect the said transfer in favour of the respondent and further an order of permanent injunction restraining the appellant whether by himself or his agents, servants or persons whomsoever claiming through him from entering into and doing any act or deed of whatsoever nature detrimental to the respondents quiet possession and occupation of Nandi/Kokwet/380. The appellant filed a reply to defence and defence to counterclaim denying the allegation by the respondent.

When the matter came up for hearing, the appellant testified that he lives in Koserai, Nandi Count. That he is a peasant farmer and he knows Elizabeth Jeptoo Mosong as his neighbor. He has sued her since she has been illegally occupying his land Nandi/Kokwet/380 for 5 years. She had leased the land for 3 years but lived therein for 5 years. He asked her to vacate but she has refused to do so. On cross examination, he stated that she leased the land initially in 2007, but they never had any agreement. She has a house in the land Nandi/Kokwet/380 about 5 years old. He got his title deed in 2010 long after defendant was in his land Nandi/Kokwet/380. That he has no relationship with the respondent. He never wrote to her an eviction letter prior to this court proceedings. That he has had a case at the District Officer over this land Nandi/Kokwet/380 dated 15.10.2010. She is not married at their place. PW2, Isaac Kipkemboi Sutar testified that he does not know the respondent but knows the appellant. According to PW2, the parcel of land belongs to the appellant.

On her part, the respondent testified that she is a peasant farmer having been married in 1982 in Kipkaren to one Hadija Cheptoo who died in 1985 where she lived between 1982 – 1985 and got into Kokwet in 2004. In 1985 to 2004, she was at her parents' home living with Clement

and his mother. Her "husband" Hadija died and the appellant began mistreating her and demolished her house and sent her away in 2005. Her parents asked the appellant to allow her live in the land and that she lives in the land to-date. The appellant's mother and her "husband" are sisters. The appellant has no house on the parcel of land and that the respondent has 4 children 3 of them having been born and living on the parcel of land.

DW2, Thomas Kiptoo Tallam a farmer living in Kapsabet, testified that he is 65 years and comes from the Nandi community. He knows the appellant who is the respondent's uncle. He has been to appellants place in Nandi. The appellant is a peasant farmer and that the respondent lives in Nandi/Kokwet/380. The respondent is married to the appellants mother's sister called Hadijah who is since deceased. In 2005, he went and built the respondent a house, a kitchen, toilet where she lives in to date. On cross examination, he stated that he is the respondent's uncle, a brother to her mother. The respondent resides on the land while the appellant does not.

DW3, Augustine Kiplimo Kisarai testified that he is a peasant farmer in Kosirai where he has lived since birth. He was born in 1947 in Kosirai, Nandi. He knows appellant, who used to live in Kosirai but moved to Kipkaren, Selia in 1967. The respondent lives in Kosirai which is her marital home. He saw her in 1995 when he went for Hadija's funeral. Hadija and Timing, the appellants mother are Minura's children. Clement was living with the grandmother. Hadija married the respondent since she never gave birth to any children of her own. Cows were sent to the respondent's home in an elaborate customary marriage. According to this witness, the land belongs to Hadija and the respondent is justified to live in her husband's home.

William Kiptarus Melly came as DW4. He is the village elder and at the time of testifying, he had been a village elder for 20 years. He knows the appellant and the respondent for a period of more than 15 years. Elizabeth was Hadija's "wife". Nandi/Kokwet/380 was Hadija's land.

After the close of the respondent's case, the court retired to write its judgment. The court after analyzing the pleadings, proceedings and evidence on record, found that the issues for determination were:

1. Whether there was a woman to woman marriage between Elizabeth and Hadija.

2. What are the rights of the spouses herein upon death of one spouse?

The learned Magistrate found that the evidence adduced by defence was credible and well corroborated and that the witnesses were diverse. The appellant claims lacked merit and therefore, the suit was dismissed with costs. The court found that the land belonged to the respondent by virtue of her marriage to the deceased Hadija and also as presented under the law of Succession. The appellant being dissatisfied with the judgment, has come to this court on six (6) grounds namely:

1. That the learned trial Magistrate erred in law and fact in relying on extraneous evidence and delivering judgment in favor of the respondent without proper or legal justifications.

2. That the learned trial Magistrate erred in law and in fact in failing to establish that the plaintiff had not proved the suit on balance of probability.

3. That the learned trial Magistrate erred in law and in fact in failing to make a finding in her judgment that the respondent was not the legal owner of land parcel Nandi/Kokwet/380.

4. That the learned trial Magistrate erred in law and in fact in failing to appreciate that the appellant is the registered owner of land parcel Nandi/Kokwet/380 and therefore, the absolute proprietor of the land.

5. That the learned trial Magistrate erred in law and in fact to appreciate the provisions of Section 26 of the Land Registration Act 12, which provides that a Certificate of Title is conclusive evidence of proprietorship.

6. That the learned trial Magistrate erred in law in hearing the case on 28th June, 2012 without jurisdiction on matters involving land which is the preserve of Environment and Land Court of the High Court and not the subordinate court as provided for under Section 13(i) and 3 of the Environment and Land Court Act of 2011 as read with Article 162(2)(b) of the Constitution of Kenya.

When the matter came up for submission, the appellant crystalized the grounds of appeal into two (2) and therefore, he abandoned the 3 other grounds of appeal. The **first** ground is that the learned Magistrate relied on extraneous evidence of woman to woman customary marriage and failing to establish that the plaintiff was legal owner of L. R. No. Nandi/Kokwet/380. **Secondly**, that the respondent has not proved her case and that she has not laid out any evidence at all that she is legally entitled to the land parcel Nandi/Kokwet/380.

The appellant argues that being the registered proprietor of L. R. No. Nandi/Kokwet/380, he is protected by Section 24, 25 and 26 of the Land Registration Act. According to the appellant, there is no legal justification for the Honourable Magistrate to dismiss the appellant's claim on the basis of woman to woman marriage. The appellant argues that woman to woman marriage has nothing to do with a claim based on Land Registration Act NO. 3 of 2012. On jurisdiction, the appellant argues that the Magistrate's Court lacked jurisdiction to entertain an Environment and Land matter by dint of Article 162 of the Constitution and section 13 of the Environment and Land Court Act.

The respondent on his part argues that the appellant cannot invoke jurisdiction when it is clear that he had filed the suit in the Magistrate's Court. Moreover, that the suit was filed before the creation of the Environment and Land Court. On absolute ownership, the respondent submits that registration of title is not absolute as there can be overriding interests. In this case, the respondent was in possession of the suit property having been married to Hadija who was the beneficial owner of the property. The respondent had overriding interests as the spouse

of the deceased.

Having considered the rival submissions of counsel herein, I do find that the following issues are ripe for determination:

1. Jurisdiction of trial Magistrate's Court.

2. The proprietorship of Nandi/Kokwet/380.

3. The relationship between the respondent and Hadija.

4. Whether spousal interests in land apply to woman to woman marriage.

On jurisdiction, this court finds that the matter before the Lower Court was filed on the 13.1.2011, before the enactment of the Environment and Land Court Act came into force on 30.8.2011. Section 30 of the Environment and Land Court Act provides that all proceedings relating to the environment or to the use and occupation and title to land pending before any court or being Tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under the Act comes into operation or as may be directed by the Chief Justice or Chief Registrar.

On 9.11.2012, the Chief Justice published Practice direction whose import was that Magistrate's Court shall continue to hear and determine all cases relating to the environment and the use and occupation of and title to land (whether pending or new) in which the courts have requisite pecuniary jurisdiction. I do find that the Magistrate's Court had the pre-requisite pecuniary jurisdiction to determine the matter and therefore the appeal on jurisdiction fails.

On the proprietorship of the suit property, this court finds that the register for Nandi/Kokwet/380 was opened on 4.9.1968 and registered in the name of Kipkenei Arap Sing'oei. The title to the property was issued in the name of the appellant, also known as Kipkenei Arap Singoei on the 27.9.2010. On the 18.9.2013, the respondent lodged a caution claiming beneficiary interest. On the 25.4.2014, a decree was issued by the Lower Court transferring the whole land to the respondent.

It is evident from the record that the respondent was married in the family of the appellant to one Hadija who was the appellant's mother's sister. The respondent lived in the said parcel of land since 1982 to 1983 when she was chased away but was accepted back in 2005 where she has put up a house and lives with grown up sons. She claims that the parcel of land is ancestral.

I do believe that the respondent is saying the truth as the appellant has not offered any reason as to why the respondent was in possession of the land. The issue of a lease by the appellant to the respondent does not arise as no evidence was offered by the appellant. Moreover, DW2, corroborates the evidence of the respondent that the respondent was married to Hadija in woman to woman marriage. The same is corroborated by DW3 who states that the respondent was married by Hadija in woman to woman marriage and that the land in dispute belonged to Hadija and therefore, Hadija being the husband to the respondent the latter was entitled to the suit land as the spouse of Hadija.

I do find that the respondent demonstrated that she was legally married to Hadija who settled her in the suit land. The customary woman to woman marriage being legally recognised, I do find that the respondent established that she had beneficial interest in the said property as the spouse to Hadija who had settled her on the disputed parcel of land. Section 30 of the Registered Land Act, Cap. 300, Laws of Kenya(repealed) which is applicable in this case provided for overriding interest thus;

Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -

(a) -----

(b) -----

(c) -----

(d)-----

(e)-----

(f) -----

(g)----- the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;

I do find that the respondent's interest though not noted on the register were overriding interests by virtue of section 30 of the Registered Land Act Cap 300 Laws of Kenya (repealed). The respondent is entitled to this property having been in possession of the same for a very long period of time from 1983 to 2011 when the suit was filed. Going back to the decision of the learned Magistrate, I do find that the learned Magistrate did not misdirect himself on the existence of woman to woman marriage between Hadija and the respondent and therefore, the respondent was entitled to the suit land as the spouse to Hadija who resided on the property with the respondent before the former died. Hadija and the respondent had overriding interests on the suit property under the repealed Land Registration Act Cap 300 Laws of Kenya(repealed) where they lived from 1982 to 1983 and where the appellant has never lived but obtained title of the same on 27th

September, 2010. The upshot of the foregoing is that the appeal lacks merit and is dismissed with costs.

Dated and delivered at Eldoret this 11th day of May, 2018.

A. OMBWAYO

JUDGE