



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 27 OF 2010

(FORMER MERU HCA. 129 OF 2009)

TURIBU MBERIA.....1ST APPELLANT

MUTUMA MBERIA.....2ND APPELLANT

KAVIRIA M'MBIRITHIA

(Legal representative of M'MBIRITHIA M'THIRINGA)....3RD APPELLANT

VERSUS

MARGARET KIINGE.....RESPONDENT

(Being an appeal against the whole of the judgment in Meru CMCC No. 983 of 1998)

BETWEEN

MARGARET KIINGERESPONDENT

AND

TURIBU MBERIA.....1ST APPELLANT

MUTUMA MBERIA.....2ND APPELLANT

KAVIRIA M'MBIRITHIA

(Legal representative of M'MBIRITHIA M'THIRINGA)....3RD APPELLANT

JUDGMENT

The Appellant's Case

1. The respondent filed a plaint dated 30/10/1998 and an amended plaint filed on 30/3/2011 in the *Chief Magistrate Court in Meru in Civil Suit No. 983 of 1998* in which he sought the following orders against the defendants therein (who are now named as the appellants herein) :-

- (a) Orders of eviction of defendant (sic) from the plaintiff's deceased (sic) husband plot;
- (b) a permanent injunction barring reentry there;
- (c) General damages as well as costs and interests;
- (aa) against the 3rd defendant orders for a formal transfer of the plot bought from him by plaintiff's husband;

(bb) orders for eviction of 1st and 2nd defendants and all persons claiming under them from all that parcel of land known as own land plot No. 419 within Muthara duly registered by Meru Council ;

(cc) a permanent injunction re-entry thereon;

(dd) general damages plus costs and interests.

2. The 1st defendants filed a defence on 12/11/1998 and an amended defence on 4/4/2011 denying the plaintiff's claim. The 2nd and 3rd defendant filed their defence on 4/4/2011 through the same legal firm that filed an amended filed on behalf of 1st defendant. Judgment was issued on 3/3/2010. It is this judgment that the appellants are aggrieved by.

3. The appellants filed a Memorandum of Appeal on 25/3/2010 in which they listed 10 grounds which grounds can be summarized as follows:

a. That the legal representative of the deceased M'Birithia M'Thiringa was not enjoined in the suit and the court thus went ahead to pass judgment against a deceased person;

b. That the court erred in awarding costs against the 1st appellant;

c. That the court erred in failing to find that the suit land belonged to other persons not named in the suit;

d. That the court erred by granting orders not sought in the plaint;

e. That the trial court erred by not finding that the 3rd appellant never sold land to the respondent and that there was no proof of the alleged sale and that the trial court should have found that the 2nd appellant rightly bought land from the 3rd appellant;

f. That the trial court erred in not holding that the plaint was fatally defective for want of consent.

g. That the trial court failed to consider the evidence of M'Birithia M'Thiringa and the entire of the defence case.

4. The appellant have sought in their prayers that the appeal be allowed and that the entire **Chief Magistrates' Court Case Number 983 of 1998** be dismissed and that the respondent do pay the costs of both the suit and this appeal.

5. The genesis of this appeal was the case filed in the lower court. The plaintiff's case, as may be deciphered from the poorly crafted amended plaint which leaves a lot to be desired, is that the plaintiff is the administratrix of the estate of the late Stanley Kiinge. Stanley Kiinge was the owner of a **LR Athinga/Athanga Adjudication Section 419** on which stood a shop, also owned by the deceased. He had acquired the plot by way of purchase from one M'Birithia s/o M'Thiringa. M'Birithia had excised and marked out the plot for the plaintiff's husband from **LR No Athinga/Athanga /5546**. Later on another portion, which came to be known as **LR No Athinga/Athanga /5593** was excised from the same land by the 3rd defendant and sold to the 2nd defendant. The 1st and 2nd defendants with connivance of the 3rd defendants trespassed onto the deceased's plot claiming the same to be the property of his brother, the 2nd defendant, and attempted to develop the land. In the prayers in the amended plaint the plaintiff sought eviction of the defendants, an order permanently barring their re-entry thereon and an order that the 3rd defendant do transfer the plot bought from him by the deceased.

6. In the judgment dated 3/3/2010 in the matter, the court dismissed the plaintiff's suit against the 1st defendant and ordered that plot no **Athinga/Athanja/5466** together with an additional 0.02 acres be excised out of the undeveloped/unbuilt portion of plot no **Athinga/Athanja/5593** adjacent to **Plot No 5466** be transferred and registered in the plaintiff's name. The court also ordered that thereafter the 2nd defendant do retain 0.08 of an acre out of **Plot No 5593**. Finally, the court also condemned the 3rd defendant to pay the costs of the suit.

Submissions of the Parties

7. The appellants filed their submissions on this appeal on the 15/9/2017. The respondents filed their submissions on the 24/5/2016. The respective submissions of the parties were highlighted orally before this court by both counsel for the appellants and the respondents on 20/2/2018.

Determination

8. I have considered the grounds of appeal and those submissions and found it necessary to deal with the only one ground which, if it alone succeeds, may dispose of the appeal entirely.

a. That the legal representative of the deceased M'Birithia M'Thiringa was not enjoined in the suit and the court thus went ahead to pass judgment against a deceased person;

9. Regarding this issue it appears from the court record that the 2nd defendant and the deceased filed a joint defence in the suit and that the court noted the same at the beginning of the judgment. There is evidence from the face of the proceedings that the 3rd defendant was

continually sick and was not even cross examined before he died and that he gave evidence *de bene esse* on 14/10/2003. However regarding the same defendant, it is clear that the suit was commenced against him when he was alive and that he later died some time during the process of its finalization and before final judgment. The appellants submit as follows in their submissions dated 14/9/2017 in this appeal:

“The 3rd appellant died in the cause of trial and no representation was sort (sic) by respondents so as to ask for judgment against him.”

10. The appellants pray the court to refer to their submissions filed in the trial court. I have perused those submissions. There is no mention of the 3rd defendant’s demise in the submissions of the defendant. However the plaintiff submitted as follows:

“It is the plaintiff’s evidence that the deceased declined to transfer the plot to them but instead fraudulently sold the same piece of land to the 2nd defendant. Before his demise the evidence of the then 3rd defendant M’Birithia M’Thiringa was taken *de bene esse* on 14/10/03.” (underlining mine)

11. I find evidence on the court record to the effect that the court was also conscious of the 3rd defendant’s death in the following passage at **page 11** of the judgment:

“Going by what I have said above, it is now obvious that sane (sic) the 3rd defendant, there are no losers or winners in this case. It is the 3rd defendant (and now his estate) that is to blame for the reason that he was not sincere to both the 2nd defendant and the plaintiff’s late husband.” (underlining mine)

12. So does the fact that judgment was nevertheless passed against the deceased in such circumstances render the judgment null? **Order 24** of the **Civil Procedure Rules** provides as follows:

24(1) The –death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

2. Where there are more plaintiffs or defendant than one of them dies, and where the cause of action survives or continues to the surviving plaintiff alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

4(i)4 (i) where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

3) Where within one year no application is made under sub rule (1) the suit shall abate as against the deceased defendant.

7(i) where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action.

2) The plaintiff or the person claiming to be the legal representative of the deceased plaintiff or the trustees or official receiver in the case of a bankrupt plaintiff may apply for an order to revive the suit which has abated or to set aside an order of dismissal, and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside the such dismissal upon such terms as to costs or otherwise as it thinks fit.

13. A trial court is thus empowered to issue orders of revival of suit or substitution where necessary. The submissions of the plaintiff were served upon the defendant’s counsel in the ordinary course of this litigation. This must be the case because on **page 3** of their submissions the defendants have purported to answer the plaintiff’s submissions.

14. This is a suit that was filed in the year **1998**. The information of the demise of the 3rd defendant was conveyed to court by counsel for the defendants on 19/4/2004. The time between that time and the year 2010 when judgment issued exceeds the one year period required to elapse for a suit to be deemed as abated. The suit as against the 3rd defendant had therefore abated.

15. It is manifest from the record of appeal that none of the parties applied for substitution. The issue of the abatement of the suit was also not raised in opposition in the submissions of the defendants at the trial. It also appears that the trial court considered that its judgment could still be valid despite the demise of the 3rd defendant, for it gave judgment with the knowledge that the 3rd defendant was deceased.

16. In **Titus Kiragu v Jackson Mugo Mathai [2015] eKLR**, the Respondent filed an application in 2011 seeking to have the suit herein dismissed for having abated in that the defendant had died and no legal representative of his estate had been appointed to substitute him within the stipulated period of one year. The Deputy Registrar declined to grant the order. Upon an appeal to the Judge to review the orders of the Deputy Registrar it was held that the suit, with or without a judgment had abated upon the lapse of one year since the demise of the defendant and that any judgment written or based on it in its abated status, shall be null and void.

17. In the same **Titus Mugo** case (supra) it was the view of the court that where a defendant dies the burden is upon the shoulders of the

plaintiff to apply for substitution, and, where the suit has abated, also apply for revival thereof. In the circumstances of the suit before the trial court both revival and substitution were requisite but were not done.

18. In my view there was no suit against the third defendant or his estate, since he had died and the administrator of his estate had not been enjoined to the suit and the suit had abated. The judgment entered against the 3rd defendant's representative was made without his joinder to the suit and was therefore null. No orders should have issued against a person who was not a party to the suit.

19. The upshot of the above is that the judgment of the trial court, being null for the reason stated, cannot stand.

20. However I have noted that both parties were willing participants in the proceedings while the possibility that an effective judgment could not be issued without involvement of the deceased's estate loomed large. During the proceedings after the demise, the court itself appeared not to have taken consideration of the fact that the only remedy that had been available to either the plaintiff or the defendant was revival and substitution under **Order 24** of the **Civil Procedure Rules** or that the orders against the legal representative of the 3rd defendant would amount to orders against a party not in the suit and thus be null. In the circumstances this court is faced with the task of balancing the interests of substantive justice against the strictures of procedure. This must be done in the peculiar circumstances of this case due to the fact that the letter and spirit of **Article 159 (1) (d)** of our constitution requires it.

21. The circumstances that this court considers is that the plaintiff was not a legal expert and must have relied on her advocate to take action in her best interests which he or she failed to do. The mistake may be attributed to her counsel but this court has in the past ruled in favour of granting substantive justice to a party whose counsel has erred. In the case of *Kitale Land Case No. 97 Of 2008 Marcellus Lazima Chegge Versus Mary Mutoro Sirengo and Others*, while relying on the case of *Joseph Mweteri Igweta -vs- Mukira M'Ethare & Attorney General 2002 [Eklr]*, this court stated as follows:-

“Nevertheless this court finds that it is better for the plaintiff to suffer a little inconvenience which can be compensated for by way of costs rather than let the 2nd defendant walk away from court with the feeling that he has been denied a hearing on the basis of a mistake on the part of his counsel.”

22. In that latter case this court set aside orders of dismissal of the suit for non-attendance by counsel and the plaintiffs despite many glaring mistakes on the part of the counsel.

23. In the instant appeal, I consider that the dictates of substantive justice warrant that a chance be given to all the parties to re-appear before the Magistrate's court for a re-hearing of the suit on the merits rather than have any party feel that substantive justice was not done.

24. The parties have not had the chance to argue an application for revival and substitution before the trial court or this court and this court. I consider this a procedural issue that should not dictate the fate of the merits of the suit in the trial court. Dismissing the suit on this ground at this stage will not be a solution that offers lasting substantive justice to all the parties who are engaged in one way or another on the suit land.

25. This court is also disinclined to issue orders dismissing the entire suit in the trial court for the reason that the 3rd defendant who passed on was not the sole defendant and any judgment in favour of the plaintiff against the 1st and 2nd defendant would depend on the orders made against the 3rd defendant who is said to have sold the land to both the plaintiff and the 2nd defendant.

26. In the circumstances this court finds it unnecessary to deal with the rest of the grounds in the memorandum of appeal for the reason that the ground of non-substitution is sufficient to dispose of this appeal. I will therefore make no findings on those grounds, more so because of the nature of the orders that I am inclined to make in this appeal.

27. It is obvious by now that the judgment of the trial court has to be set aside wholly for the reasons stated hereinabove.

28. In the end this court finds it necessary to issue the following orders:

a. That this appeal is successful and that the entire judgment and decree of the court in Meru CMCC No 983 of 1998 are hereby set aside.

b. The suit shall be referred back to the Chief Magistrate's Court for a retrial by a magistrate other than J. Ndubi, S.R.M.

c. The respondent herein shall bear the costs of this appeal.

Dated and signed at Kitale this 12th day of June, 2018.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru this 22nd day of June, 2018

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

In the presence of:

C/A Janet

Mr. Mutunga for respondent

Appellant in court in person

No appearance from Kaume advocates