



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

HCA No. 107 OF 2010

MARY MUMBI NJOROGE.....PLAINTIFF

VERSUS

ELIZABETH WAMBUI MWAURA.....DEFENDANT

(Being an appeal from the ruling and order of the Principal Magistrate's Court

at Naivasha (Hon. N.N. Njagi (PM)) dated 22nd April 2010)

JUDGMENT

1. This appeal arises from Naivasha SPMCC No. 59 of 1985, a case which has been pending before the subordinate court for a long time. In the Memorandum of Appeal filed on 5th October 2010, the appellant states that the appeal is in respect of a ruling delivered by Hon. N. N. Njagi (PM) on 22nd April 2009 in the aforesaid case.

2. The grounds of appeal are stated as follows:

- 1. That the learned trial Principal Magistrate erred in Law in exercising appellate jurisdiction thus arriving at a wrong decision.***
- 2. That the learned trial Principal Magistrate erred in Law and in fact in failing to appreciate the fact that there was a permanent injunction in place barring the District Surveyor of Nyandarua South from entering, subdividing, alienating, wasting, damaging, fencing, building or otherwise dealing with Nya/Olaragwai/914 which is the subject matter of this suit.***
- 3. That the learned trial Principal Magistrate erred in Law and in fact in believing in whole that testimony of the plaintiff/respondent and disregarding the testimony of the defendant/appellant.***
- 4. That the learned trial Principal Magistrate erred in Law in failing to appreciate the fact that the ruling of 30th January 2009 was issued by a competent court.***
- 5. That the learned trial Principal Magistrate erred in Law and in fact holding that the orders of 30th October 2009 are capable of being executed contrary to the evidence on record.***
- 6. That the learned trial Principal Magistrate erred in Law in proceeding to hear the application dated 27th November 2009 without considering the fact that there were previous orders in force.***
- 7. That the learned trial Principal Magistrate failed to properly and/or at all, evaluate the evidence on record cumulatively and hence reached a wrong conclusion in view of the evidence on record.***
- 8. That the learned trial Principal Magistrate demonstrated bias against the appellant thus ignoring the evidence on record.***
- 9. That the learned Principal Magistrate erred in Law and in fact in disregarding the defendant's/appellant's submissions.***

3. It seems that there is an error in the Memorandum of Appeal as it refers to a ruling delivered by the learned magistrate on 22nd April 2009. I have perused the record of the subordinate court. I have not found any ruling delivered by the learned magistrate or any other magistrate on 22nd April 2009. Instead, there is a ruling delivered by the magistrate on 22nd April 2010. Indeed, in the prayers in the

Memorandum of Appeal, the court is urged to allow the appeal and set aside or vacate “the ruling delivered on 22nd April 2010”. Parties are generally in agreement that the appeal is in respect of the ruling delivered on 22nd April 2010. For that reason, the respondent states as follows in her written submissions filed in opposition to this appeal: “The appellant herein filed this appeal after a ruling that was delivered by the Hon. Mr N. N. Njagi, Principal Magistrate, sitting in Naivasha, on the 22nd of April 2010”. I will therefore deem the appeal as one against the ruling of 22nd April 2010.

4. The learned magistrate had before him two applications for determination: Notice of Motion dated 27th November 2009 (the Notice of Motion) filed by the plaintiff in the proceedings in the subordinate court and who is the respondent in this appeal (Elizabeth). The magistrate also had before him Chamber Summons (the Chamber Summons) dated 30th November 2009 filed by the defendant in the subordinate court who is the appellant in this appeal (Mary).

5. In the Notice of Motion, the following orders were sought:

1. That this honourable court be pleased to order District Surveyor Nyandarua South District to enter into and subdivide Land Parcel Number Nya/Olaragwai/914 and excise there from a portion of land measuring 25 acres to be transferred to the plaintiff/applicant.

2. That this honourable court be pleased to order the Officer Commanding Kinangop Police Station to provide security during the exercise.

3. That this honourable court be pleased to order the removal of the defendant/respondent her agents, servants and/or employees and/ or persons claiming under or in trust for her from the parcel of land so identified.

4. That the costs hereof and the costs of the suit be paid by the defendant/respondent.

6. On the other hand, the following orders were sought in the Chamber Summons:

1. That the ruling of this court made on 30th October 2009 be adopted as judgment of this suit.

2. That the costs of this application be provided for.

7. In the Notice of Motion it was contended by Elizabeth that the suit before the subordinate court was filed in 1985 by Mwaura Kahiga her husband who later passed away, against Mwangi Njoroge, the husband of Mary. Mwangi Njoroge has also since passed away. On 14th January 1994, the subordinate court entered judgment in favour of Mwaura Kahiga. Though Mwangi Njoroge obtained stay of execution pending determination of an appeal, no appeal was filed and the stay orders were later lifted. Elizabeth therefore urged the subordinate court to grant the orders sought in the Notice of Motion so as to effect the judgment of the said court.

8. Mary responded to the Notice Motion through her replying affidavit filed on 7th December 2009. She deposed that the orders sought in the Notice of Motion could not be granted since the subordinate court had issued a permanent injunction on 18th July 2009 restraining the plaintiff and the District Surveyor Nyandarua South from subdividing, alienating, interfering, wasting or dealing with the suit property.

9. In a further affidavit filed on 9th March 2010 Elizabeth denied that any permanent injunction was issued on 18th July 2009 as was alleged by Mary and that an injunction issued on 9th June 2009 expired since it was given after the suit had been determined.

10. The Chamber Summons was supported by an affidavit sworn by Mary. She deposed that the subordinate court issued a permanent injunction on 9th June 2009 restraining the plaintiff and the District Surveyor Nyandarua South from subdividing the suit land. For that reason, she urged the subordinate court to adopt its ruling of 30th October 2009 as a judgment in the case.

11. Elizabeth opposed the Chamber Summons through Grounds of Opposition filed on 26th February 2010. She took the position that the ruling delivered on 30th October 2009 was incapable of being regarded as judgment since it dealt with an application to set aside some orders which orders were in fact set aside. She added that the application is misconceived, ill-advised and an abuse of the court process.

12. The appeal was heard by way of written submissions. The appellant filed submissions on 13th October 2014 while the respondent filed submissions on 15th February 2017. The appellant argued that there existed a permanent injunction order made on 9th June 2009 and that the respondent could not proceed with another application without first having the said orders vacated and that by allowing Notice of Motion, the learned magistrate purported to sit on appeal over the orders of 9th June 2009, a jurisdiction which he did not have. She therefore urged the court to set aside the orders of 22nd April 2010 and instead make appropriate orders which serve the interests of justice.

13. For the respondent, it was submitted that there exists a valid judgment in the matter pursuant to the ruling of 14th January 1994. Regarding grounds 1 and 4 of the memorandum of appeal, the respondent submitted that there already existed a judgment and the magistrate cannot be faulted for refusing to issue a second judgment. Such refusal cannot amount to sitting on appeal from a decision of a fellow magistrate. On grounds 2 and 6 of the appeal, the respondent submitted that the record of the subordinate court does not show any order of injunction, whether a permanent or a temporary one.

14. Regarding grounds 3, 5, 7, 8 and 9 of the appeal, the respondent submitted that determination of the Notice of Motion and the Chamber Summons depended on a perusal and understanding of the record of the subordinate court. A proper evaluation of the said record supports

the findings of the magistrate and that the magistrate did not exhibit any bias against the appellant.

15. I have considered the Memorandum of appeal, the submissions made by both parties to the appeal as well as the material that was before the subordinate court. As this is a first appeal, my jurisdiction extends to re-evaluating the evidence and material that was placed before the learned magistrate and reaching my own conclusion.

16. The applications before the subordinate court sought discretionary orders. The principles applicable when considering an appeal against an order made in exercise of discretion were reiterated by the Court of Appeal as follows in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**:

Reverting to the main appeal, we emphasize by reiterating that this Court will not interfere with the exercise of discretion by the Judge in the court below unless satisfied that the decision of the Judge is clearly wrong because of some misdirection, or because of failure to take into consideration relevant matter or because the Judge considered irrelevant matters and as a result arrived at a wrong conclusion, or where there is a clear abuse by the Judge of his discretion. Whenever a court exercises a discretion, there is always a presumption of correctness of decision which is reversible only upon showing of a clear abuse of discretion.

17. I therefore cannot interfere with the exercise of discretion by the learned magistrate unless I am convinced that his decision is manifestly wrong due to some misdirection, or failure to take into consideration relevant matter or because he considered irrelevant matters and hence reached a wrong conclusion, or because there is clear abuse of his discretion.

18. I have anxiously perused the record of the subordinate court. It is manifestly clear therein that on 14th January 2004, the subordinate court entered judgment in favour of Mwaura Kahiga, the husband of the respondent (Elizabeth) by adopting and confirming the award of the panel of elders. The elders made the following orders in their award dated 8th August 1989:

1. That Mr Njoroge Mwangi the respondent in this case transfer 35 acres on title No. Nyandarua/Ol'Aragwai/914 to Mr Mwaura Kahiga.

2. That after Mwaura Kahiga gets ownership of Nyandarua/Ol'Aragwai/914, he should transfer 5 acres to the wife (sic) Njoroge Mwangi 6 acres to Mr Jeremiah Maina Kihunyu who has already paid money to Mwaura through Njoroge Mwangi.

3. That Njoroge should sign all relevant documents to enable Mwaura Kahiga acquire his title deed for the 35 acres.

4. That failure to Njoroge Mwangi in signing the documents to enable Mwaura Kahiga acquiring his title deed for the 35 acres the court be empowered to sign them on his behalf in his absence (sic).

5. That after acquiring his 35 acres and having fulfilled No. 2 above, Mwaura should be left alone by Njoroge Mwangi to develop his land without any other outside pressure or interference.

6. Both parties to maintain a status quo.

19. The judgment remains in place and has not been set aside or reviewed. That being the case, the subordinate court became *functus officio* as regards the determination of the main suit before it. What remained were only issues of enforcement of the judgment. In such circumstances, there would be no room for "a second judgment" as was sought in the Chamber Summons. The learned magistrate correctly stated as follows:

The court notes that the orders of the 30th October 2009, by the defendant have not in any way set aside the ruling of the court delivered on 14th January 2004. The ruling of the court still stands and has not been challenged to-date by the defendant/respondent. The ruling of the court on the 14th January 2004 confirmed the award by the panel of elders dated 8th August 1989 and filed in court on 11th August 1989 and read to the parties on the 29th September 1989

From the foregoing therefore it is worthy to point out that the orders of the 30th October 2009 are incapable of being executed and my humble view is that we cannot adopt them as they shall be going against the judgment of the court as entered against the defendant in favour of the plaintiff on 14th January 2004. It stands to-date as there is no other order from the superior court to reverse it.

20. Looked at from all perspectives, the findings of the learned magistrate in dismissing the Chamber Summons cannot be faulted. Grounds 1, 4, 5 and 6 of the appeal therefore fail.

21. Regarding grounds 2, 3, 7, 8 and 9 of the appeal, I have already noted that there was and remains judgment on record in favour of the respondent. The Notice of Motion was simply an effort at enforcing the judgment. The appellant's arguments that there was a permanent injunction in place would not avail the appellant any reprieve from the judgment which remained unchallenged. In any case, I have perused the record and I have not seen any such order as the appellant is alluding to. In the circumstances, grounds 2, 3, 7, 8 and 9 of the appeal also fail.

22. In the end, the appeal is dismissed with costs to the respondent.

Dated, signed and delivered in open court at Nakuru this 20th day of June 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the appellant

Mr P.K. Njuguna for the respondent

Court Assistants: Gichaba & Lotkomoi