



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 11 OF 2015

LALA NTONJIRA.....APPELLANT

VERSUS

TRICIA MUTHAICU KABERIA.....RESPONDENT

JUDGMENT

*(Being an appeal from the original judgment of the learned
magistrate Hon. Oscar Wanyaga RM in RMCC no. 177 of 2014).*

INTRODUCTION

1. This appeal arises from the judgment of the learned resident magistrate in Maua Hon. Oscar Wanyaga delivered on 9th March 2015. The respondent who was the plaintiff in the magistrate's court case had sued the appellant/defendant for eviction from land parcel registered as number Njia/Burieruri/343 measuring approximately 0.26 hectares. The plaintiff/respondent had also sought the costs of that suit and any other orders the honourable court may deem fit and just to grant.

2. In a plaint dated 1st September 2014 and filed on 2nd September the same year the plaintiff/respondent averred that he was the sole registered owner and proprietor of the said parcel of land which she complained had been encroached and trespassed into by the defendant/appellant.

3. In a statement of defence filed on 8th September 2014 the defendant/appellant denied the plaintiff's/respondent's claim and put her to strict proof thereof. On the contrary the defendant/appellant stated that she has been in lawful occupation of the land parcel number Njia/Burieruri/343 which her husband was allocated by her father-in-law. She sought to have the suit dismissed with costs.

PLAINTIFFS/RESPONDENTS CASE

4. In her witness statement dated 1st September 2014 and filed on 2nd September 2014, the plaintiff stated that he had bought the suit land L.R Number Njia Burieruri/343 measuring 0.26 hectares from one Ntundu M'Mwereria sometime in the years 2013. Upon purchase of the said land he was shown the boundaries by the land registrar Meru North. During the hearing of the case the plaintiff testified on oath and while adopting his witness statement filed in court she stated that after she brought the suit property, she visited the same but the defendant/appellant who was living on the suit property chased them away. She produced the title deed to the suit property together with a certificate of search as p exhibits 1 and 2

respectively.

5. On cross examination the plaintiff stated that he did not check whether the land he was buying was vacant. He visited the land after he had purchased and obtained title deed to the suit land. He said that he bought the suit land at a price of Kshs.700,000. However, he did not put down any written agreement. He said that he could not secure the transfer form as he left everything in the lands office.

DEFENDANTS/APPELLANTS CASE

6. The defendant in the trial court before the magistrate stated that the suit land belonged to her father-in-law one M'Mwereria Kirichia. Since she got married, she has been living in the suit land and were blessed with six (6) children. When they came to learn that the suit property is not registered in her father in laws name, they conducted a search in the lands office. She did not know Ntundu Kirichia who allegedly sold the suit property to the plaintiff. Her husband is Joseph Ntonjira. She lives in the suit land with her family and father in law while doing farming.

7. DW 2 was M'Mwereria M'Nkarichia born in 1929. He lives in the suit land with his daughter in law Ntonjira Lala (defendant) and her husband Koome. He identified a land office sketch booklet for the suit property. He was given by his father. He has lived in the suit property since he got married. His wife was buried in the suit land. He has never sold the land to anyone. He does not know Ntundu Mwereria who allegedly sold the land to the plaintiff/respondent. He produced the land office sketch booklet as D. exhibit no. 1.

8. DW3 was Daniel Kamanja. He was the district land registrar Meru North. The suit property is situated within his jurisdiction. He identified the green card indicating that the file was opened 10/6/1988 which measures 0.26 ha under registry map sheet no. 12.

9. The first registration was done on 10.6.1988 by Ntundu Mwereria. On 7.3.2014 they received a correction of name and the proprietor changed to read Thurania M'Mwereria ID No. 3220313. On 10.3.2014 they received a transfer from Thurania M'Mwereria to Tiricia Muthaicu ID no. 8699259 with a consideration of Kshs. 100,000. On 21.3.2014, the registry issued a title deed.

10. On 19.6.2014 they received a complaint that there was fraud. They issued a restriction on 19.6.2014 pursuant to the Registered Land Act (cap 300) laws of Kenya (repealed) pending investigations as to the allegations of fraud. After perusing the records they committed the chief of Kiolo Kia Muuti sub location ID no. 7750763 to give/swear an affidavit. The said chief swore that he knew Thurania M'Mwereria did not come from Burieruri.

11. They also requested Thurania M'Mwereria to swear another affidavit which he did. From the file the documents were adequate to change the name from Ntundu Mwereria to Thurania M'Mwereria.

12. He received an adjudication record (AR) showing the owners as Tundu Muereria dated 20/3/1986 which they used to open the file. He stated that the consideration disclosed was for Kshs.100,000 and not Kshs.700,000/=

13. After the trial court rendered its decision on 9th March, 2015 the defendant was dissatisfied with the same and excised her right of appeal to this honourable court citing the following grounds:

(i) That the learned trial magistrate erred in law and in fact in delivering a judgment that was manifestly oppressive and against all legal statutory legal provisions.

(ii) That the learned trial magistrate erred in law and fact in failing to accord the appellant right of appeal and giving a notice of seven days to the appellant to vacate from land which she has extensively developed and occupied.

(iii) That the learned magistrate lacked jurisdiction to order eviction of appellant from the disputed

parcel of land.

(iv) That the learned trial magistrate erred in law and in fact in failing to find that the appellant is not the registered owner of land parcel number Njia/Burieruri/343 and that there was misjoinder of parties in the suit.

(v) That the learned trial magistrate erred in law and in fact in failing to find that the orders of eviction against the appellant are incapable of enforcement.

(vi) That the learned trial magistrate erred in law and in fact in failing to find that consent of the land control board was fictitious.

(vii) That the judgment of the honourable magistrate court is full of contradictions, self-imposed amendments that were not made by the respondent fraud having been established on the part of the court still went ahead to allow the prayers in the plaint.

(viii) The judgment of the honourable magistrate is a recipe for chaos, in that it seeks to be enforced against strangers who were not party to the suit.

(ix) That the learned trial magistrate erred in law and in fact in failing to ensure that issues were framed before the trial and instead proceeded to amend the plaint and introduce his own issues thus being biased in this judgment.

(x) That the learned trial magistrate erred in law and in fact in failing to consider the evidence of the said registrar all available evidence on record on how fraud was perpetuated by the respondent and instead introduced his own evidence and conclusions.

(xi) That the learned trial magistrate erred in law and in fact proceeding with a case which not complied with order II of the civil procedure Act 2010.

(xii) That the learned magistrate erred in law and in fact in failing to appreciate that the respondents acted ultra vires against the constitution of Kenya 2010 under article 40.

(xiii) The learned magistrate erred in law and fact in failing to appreciate that the respondent ought to have been condemned to pay costs of the suit in the face of lack of notice of demand.

ANALYSIS AND DECISION

14. The powers of an appellate court was underscored in the case of **Peters Vs Sunday Post Ltd (1958) EA at page 429** where it was held as follows:

“It is a strong thing for an appellate court to differ from the finding on a question of fact, of the Judge who filed the case, and who has had the advantage of seeing and hearing the witness. But the jurisdiction (“to review the evidence) should be exercised with caution; it is not enough that the appellate court might have come to a different conclusion”.

15. From the analysis of the evidence adduced by the parties the trial magistrate noted that the parties did not frame any issues for determination by the court nor made any submissions, oral or written. The trial magistrate from the position taken by the parties and in his own wisdom identified four (4) issues as follows:

(a) Has the defendant been able to establish any fraud on the part of the plaintiff in acquiring title to the suit property and has the plaintiff been able to establish that her proprietorship of the suit property is lawful?

(b) Is the defendant in occupation of the suit property and are there other people on the suit

property who ought to have been sued and served with the pleadings in this case?

(c) Are the orders sought justified and warranted?

(d) Who should bear the costs of this suit?

16. Order 11 of the civil procedures rules (cap 21 laws of Kenya) provides a pre-trial conference where parties to a suit are required to inter alia agree on any contested and uncontested issues. These issues can be determined from the pleadings themselves. Order 2 rule 4 Civil Procedure Rules requires that any party who wishes to rely on fraud or any other act of illegally must particularize the same in his pleadings. Upon perusal of the defence there is no allegations of fraud pleaded and particularized by the defence in his statement of defence. It was therefore in my respective view a misdirection for the trial magistrate to frame an issue asking whether the defendant has been able to establish any fraud when the same has not been pleaded and/or particularized.

17. The honourable court in my view misdirected itself in solely framing issues which are not pleaded by the parties and not giving them an opportunity to address them in their submissions. If indeed the trial court wanted the parties to address the issues framed, it should have involved them during the pre-trial conference so as to identify the same as triable issues. The parties and their advocates should also have been given an opportunity to either amend the pleadings and raise those contested issues or have them addressed during their submissions.

18. It was a misdirection for the trial court to solely frame issues and make a finding that the same has not been proved when the same has not been pleaded and the parties asked to submit on.

19. I have also noted from my evaluation of the evidence that the appellant is the wife of one Joseph Ntonjira. The appellant stated that the suit property belongs to her father in law one M'Mwereria Kairichia. The said M'Mwereria M'Kairichia even testified and produced a sketch book (D exhibit no. 1) which recorded him as the owner of the suit property. The said M'Mwereria M'Kairichia also testified that he has lived with his family in that land since time immemorial. The plaintiff is said to have bought the suit land from one Ntundu Mwereria who sold him the land. The plaintiff also testified that they did not visit the suit property before he purchased it. There are also evidence that though the land was registered in favour of Ntundu Mwereria in 1988, there were some correction of proprietorship to Thurania M'Mwereria in place of Ntundu M'Mwereria.

20. These are very serious issues which could not have been done without involving the parties who were in occupation. The property from the sketch book produced by DW 2 who is the person recorded as the proprietor of the suit property ought to have been enjoined as a defendant in this suit.

21. When DW 2 filed a separate suit number 41/2015, the court should have consolidated the two cases to determine the real issues in controversy. I find and hold that the plaintiff/respondent before the trial magistrate court did not proof his claim on a balance of probabilities. The probability of the evidence adduced points to more questions than answers. From my evaluation of the evidence adduced as a whole there was a misjoinder of parties.

22. The framing of issues by the court and raising the question of fraud which was not pleaded and which the parties were not given an opportunity to amend their pleadings and particularize or address in their submission was itself a misdirection by the trial magistrate.

23. The plaintiff/respondent indicated that he bought the suit property before visiting the scene to confirm whether the same was vacant. Upon visiting he found that it was occupied by the defendant/appellant, her husband and father in law together with their families. It was in my view a drastic order to issue eviction orders when the rules of natural justice were not followed.

24. My evaluation of the evidence adduced by the defence witness no. 3 indicates that the suit property was registered in favour of one Ntundu Mwereria as early as 20/3/1986 and that on 7.3.2014 they

received an application for correction of the register. The registered proprietor wanted to change his name from Tundu Mwereria to Thurania M'Mwereria. That was not a correction of name that could be casually made by way of an affidavit but it should have been done through the process of a deed poll.

25. I find that those changes of names was suspicious and ought to have been done through the correct process.

26. For all the occasions I have given I find this appeal merited and the same is hereby allowed in the following terms;

(i) The judgment and orders of the learned trial magistrate allowing the plaintiffs suit dated on 9.3.2015 be and is hereby set aside.

(ii) That the case being CMCC No. 177/2014 be and is hereby referred back to the Chief Magistrate Maua Law Courts for Re-trial on priority basis by a magistrate authorized to handle environment and land cases other than Hon. Oscar Wanyaga.

(iii) Each party shall bear her own costs of this appeal.

(iv) The status quo to be maintained pending the hearing and determination of the re-trial case.

Read, delivered and signed in the open court this 14th day June, 2018

MR. E. CHERONO

ELC JUDGE

In the presence of:

CC: Galgalo

N/A appellant present

N/A for respondent