



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C.A CASE NO. 3 OF 2016

BETH WANJIRU KARANJA.....APPELLANT

VERSUS

JEAM MURITHI NJIRU.....RESPONDENT

(Being an appeal from the judgement and decree in Embu CMCC No. 229 of 2013

delivered on 8th February 2016 by Hon S.K. Mutai – Senior Resident Magistrate)

JUDGEMENT

1. This is an appeal against the judgement and decree of Hon S.K. Mutai (SRM) dated 8th February 2016 in *Embu CMCC No. 229 of 2013*. By the said judgement the trial court had allowed the suit by the Respondent, who was the Plaintiff, and dismissed the counterclaim by the Appellant, who was the Defendant.

2. The brief facts of the said proceedings are that the Respondent who was the registered owner of *Title No. Kyeni/Kigumo/2576* (hereinafter called the *suit property*) sued the appellant alleging that the Appellant had trespassed into the suit property and settled thereon without any colour of right. It was further pleaded that the Appellant had wrongfully placed a caution against the suit property. The Respondent, therefore, sought the following reliefs against the Appellant;

- a. An order of eviction of the Defendant, her agents, servants and/or anybody else claiming under any interest in parcel of land number Kyeni/Kigumo/2576.*
- b. Removal of caution.*
- c. Mesne profits*
- d. Costs of this suit*
- e. Interest on (a), (c) and (d) above at court rates.*
- f. Any other relief that this honourable court may deem fit to grant.*

3. By a defence and counterclaim dated 21st November 2013, the Appellant denied the Respondent's claim. It was pleaded that the Appellant was in occupation as of right and that the caution was intended to protect her interest in the suit property. It was further pleaded that the Appellant had sometime in 1980 purchased the suit property from the Respondent's father one, Njeru Mairani. It was also pleaded that the said vendor died before he could transfer the suit property to the Appellant hence the Respondent was holding the suit property in trust for her.

4. The Appellant, consequently, sought the following orders in the counterclaim against the Respondent;

- a. A declaration that the Plaintiff holds parcel of land No. Kyeni/Kigumo/2576 in trust for the Defendant.*
- b. Registration of parcel land No. Kyeni/Kigumo/2576 in the Defendant's name.*

c. *Costs of suit and interest.*

5. Upon a full hearing of the said suit, the learned trial magistrate found that the Respondent had proved his case to the required standard and entered judgement in his favour. The learned Magistrate also held that he had no jurisdiction to cancel title to land hence the Appellant's counterclaim could not be upheld as it would result into cancellation of the Respondent's title. The trial court was of the view that only the Environment and Land Court had jurisdiction to order cancellation of title. The Appellant's counterclaim was consequently dismissed with costs.

6. The Appellant was aggrieved by the said judgement and she filed a memorandum of appeal dated 11th March 2016 raising the following eight (8) grounds of appeal.

a. *The learned Senior Resident Magistrate erred in law and fact when he ignored the Appellant's evidence and in particular that on 24th July 1980 the then Embu North Land Control Board had granted consent to subdivision of original parcel of land No. Kyeni/Kigumo/1962 into 2 portions and thereafter for transfer of 3 acre portion to the Appellant's mother Lucy Wanjiku Njeru (deceased). (sic)*

b. *The learned Senior Resident Magistrate erred in law and fact when he failed to consider the effect of the consent granted by the Land Control Board as set out at section 8 (2) of Land Control Board Act Cap 302 Laws of Kenya.*

c. *The learned Senior Resident Magistrate erred in law and fact when he failed to consider that Lucy Wanjiku Njeru had for over 40 years been in occupation of the parcel of land in issue openly, peacefully and uninterrupted and as such the Respondent had lost claim on the said parcel. (sic)*

d. *The learned Senior Resident Magistrate erred in law and fact when he failed to consider that Lucy Wanjiku Njeru (deceased) was justified in placing a caution against the parcel of land in issue.*

e. *The learned Senior Resident Magistrate erred in law and fact in failing to hold that the Respondent who was aware that Lucy Wanjiku Njeru had a claim on the parcel of land in issue had a duty to notify her at the time of filing succession proceedings in respect of his deceased father's estate.*

f. *The learned Senior Resident Magistrate erred in law and fact when he held that he did not have jurisdiction to cancel a title deed.*

g. *The learned Senior Resident Magistrate erred in law and fact in believing the Respondent's evidence as against the Appellant.*

h. *The learned Senior Resident Magistrate erred in law and fact when he gave judgement against the weight of the evidence adduced.*

7. The Appellant consequently prayed for orders that;

a. *That the judgement in Embu CMCC No 229 of 2013 be set aside.*

b. *That judgement be entered in favour of the Appellant as sought in the counter claim.*

c. *The costs of the appeal be provided for.*

8. It would appear from the record that the advocates for the parties herein appeared before the Deputy Registrar on 13th November 2017 whereby they agreed to canvass the appeal through written submissions. Consequently, the Appellant filed her submissions on 25th January 2018 whereas the Respondent filed his on 9th March 2018.

9. The court is aware that as the first appellate court it is obliged to re-look at the entire evidence before the trial court, make its own evaluation and draw its own conclusions thereon. The principles guiding a first appellate court were summarized in the case of **Sielle Vs Associated Motor Boat Co. Ltd & Others [1968] EA 123 at page 126** as follows;

"...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

10. The 1st and 2nd grounds of appeal appear to overlap hence they can be dealt with together. The trial court was faulted for failing to consider and give due weight to the fact that the Land Control Board (hereinafter called *LCB*) had granted consent for the sub-division of the original parcel of land Title No. *Kyeni/Kagumo/1962* (hereinafter called *parcel No. 1962*) into two equal portions so that a portion of 3 acres (i.e. the suit property) could be transferred to the Appellant's mother.

11. The Appellant had pleaded in the counterclaim that after the Respondent's father (hereinafter called *Mairani*) had sold a portion of 6 acres to her, he also mischievously sold the same portion of land to another purchaser called Peter Kathendu (hereinafter called *Peter*). It was further pleaded that when the said dispute was reported to the LCB, it was directed that parcel No. 1962 be subdivided into two portions with

the Appellant's mother and the said Peter taking 3 acres each. The LCB then proceeded to grant consent for the sub-division and respective transfers. It was stated that Mairani passed on before transferring the 3 acres to the Appellant's mother as directed by the LCB.

12. It was, therefore, submitted by the Appellant that the effect of the consent of the LCB was that her mother was entitled to the suit property as of right. The court has considered the provisions of **Land Control Act (Cap 302)** which establish and regulate the functions and operations of the LCB. The functions entail regulating dealings in controlled transactions with respect to agricultural land as defined in that Act. The Board may, therefore, grant, defer or decline consent with respect to controlled transactions. No mandate is granted to the LCB to adjudicate on agreements for the sale of land or land disputes generally. In the opinion of the court, the LCB in the instant case had no jurisdiction to impose a solution with respect to the land dispute between the then registered owner Mairani and the two purchasers. Consequently, it had no jurisdiction to order for subdivision of parcel No. 1962 for the purpose of resolving the land dispute.

13. The court is further of the opinion that the consent of the LCB simply means that a controlled transaction has been sanctioned by the LCB. Since a transaction which is not so sanctioned becomes void under section 8 of the Land Control Act, then the significance of the consent is really to give legal validity to a controlled transaction. The consent does not obligate or compel the parties to a transaction to complete it. A party may, therefore, still renege from a contractual agreement even after consent has been granted. Just like other typical contracts, a contract for the sale of land may be rescinded for breach thereof or other lawful justification.

14. The court does not, therefore, agree with the Appellant's submission that the mere grant of a consent conferred upon her mother a proprietary interest in the suit property. If the vendor, that is, Mairani was in breach of the agreement for sale, then such consent would entitle the purchaser to mount a claim for specific performance. It is only an order for specific performance which can confer upon a purchaser an interest in land. The consent of the LCB would merely constitute facilitative evidence.

15. The pleadings on record indicate that the Appellant had no claim for specific performance. There was some evidence on record to the effect that the Appellant's mother had sued Mairani for specific performance in *Nyeri HCCC No. 80 of 1978* with an alternative prayer for refund of the purchase price together with interest and costs. There was also some evidence that the Appellant's mother had obtained judgement for a refund of the purchase price for the 6 acres she had paid for.

16. What was disputed by the parties in their evidence was whether the late Mairani ever refunded the purchase price. The Respondent contended that the refund was made but the Appellant contended otherwise. The court is of the view that even if the purchase price was never refunded, it would be of no legal consequence. The Appellant's mother had obtained a decree in her favour for a refund. She was at liberty to execute the decree for recovery of the purchase price. The 1st and 2nd grounds of appeal must consequently fail.

17. The 3rd ground of appeal faulted the trial court for failing to consider the Appellant's occupation of the suit property for over 40 years. It was submitted that the Respondent's claim for recovery of the suit property had been extinguished under **section 7 of the Limitation of Actions Act (Cap 22)**. The said section prescribes a limitation period of 12 years for an action for the recovery of land.

18. The court has carefully considered the defence and the counterclaim in this matter. The Appellant did not plead the defence of limitation of actions in either her written statement of defence or counterclaim. She simply pleaded that she was in occupation of the suit property by virtue of a sale agreement and that consequently, the Respondent was holding the suit property in trust for her.

19. As was held in **Odd Jobs Vs Mubia [1970] EA 476**, **Vyas Industries Ltd Vs Diocese of Meru [1982] KLR 114** and **Galaxy Paints Co. Ltd Vs Falcon Guards Ltd [2000] 2 EA 385**, a court of law should not base its decision upon an unpleaded issue. In the case of **Galaxy Paints Co. Ltd Vs Falcon Guards Ltd** (*supra*) the court held *inter alia*, that;

“It is trite law, and provisions of Order XIV of the Civil Procedure Rules are clear that issues for determination in a suit generally flow from the pleadings and, unless pleadings are amended in accordance with provisions of the Civil Procedure Rules, the trial court by dint of the provisions of Order XX Rule 4 of the aforesaid rules may only pronounce judgement on the issues arising from the pleadings or such issues as the parties framed for the court's determination.”

In Gandy Vs Caspair [1956] EACA 139, it was held that unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute clearly amounts to an error on the face of the record...”

20. The exception to that general rule was recognized in the case of **Vyas Industries Vs Diocese of Meru** (*supra*) in the following terms;

“The second question is whether the issue of vicarious responsibility became an issue in the suit. The circumstances in which an unpleaded issue can become an issue is a question which was considered in Odd Jobs Vs Mubia [1970] EA 476 in which it was held that;

a) A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the court for decision.

b) On the facts the issue had been left for decision by the court as the advocate for the Appellant led evidence and addressed the court on it.”

21. In the circumstances of this case, the trial magistrate cannot be faulted for failing to frame and consider an issue which was not pleaded by the Appellant. There is no evidence on record to demonstrate that the issue of limitation was left to the decision of the court. The parties and their advocates did not direct their evidence on this issue. Neither of the parties made submissions on the issue. The court, therefore, finds no merit in this ground of appeal and the same is accordingly disallowed.

22. The 4th issue faults the trial court for failing to consider and find that the Appellant's mother was justified in cautioning the suit property. In her written submissions, the Appellant departed from this ground in very material respects. First, it was submitted that the trial court erred in failing to find that the caution registered against the suit property in 1985 was unprocedurally removed. Second, it was submitted that the trial court erred in failing to find and hold that the Appellant was not given sufficient notice for removal of the caution because she received the notice of removal only five days before the deadline for lodging an objection to its removal. It was submitted that the period of 30 days should have started running with effect from the date of actual receipt of the notice and not from the date of the notice.

23. The court finds that that is an unacceptable shifting of goal posts midstream by the Appellant. However, the court does not find any merit in this ground of appeal. There was no evidence on record to demonstrate that the removal of the caution was unprocedural. The Appellant admitted at the trial to having received the notice of removal of the caution at least 5 days before the deadline. There was no reason she he did not act diligently to lodge her objections.

24. The material provisions of **section 73 of the Land Registration Act, 2012** relating to removal of cautions state as follows;

1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.

2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.

3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.

25. It is apparent from the said provisions that the law does not specify that the Registrar must grant a cautioner a clear 30 days or that time for purposes of **section 73 (2)** can only start running upon actual receipt of the notice by the cautioner. In the instant appeal, the Appellant conceded having received such notice at least 5 days before the deadline. The court, therefore, finds no merit in the 4th ground of appeal.

26. The 5th ground of appeal faulted the trial court for failing to hold that the Respondent had a duty to notify the Appellant of the filing of the succession proceedings pursuant to which he obtained title to the suit property. The court has noted from the Appellant's defence and counterclaim that although she described the Respondent as the son and legal representative of the estate of the late Mairani, she did not plead that he had obtained the suit property secretly or fraudulently.

27. The court has considered the entire evidence on record on this issue. Whereas the Appellant denied knowledge of the succession proceedings, the Respondent contended that she was fully aware of those proceedings. The trial court did not specifically consider this issue or make a finding thereon. The court's view of the matter is that assuming the Appellant was unaware of the succession proceedings in the first instance, she must have become aware thereof upon the filing of the suit in 2013 when the Respondent proclaimed to be the registered proprietor. There was no evidence on record to demonstrate what steps, if any, the Appellant took to challenge the grant issued in the succession cause. The court is aware that judgement was delivered by the trial court in 2016, that is, almost three (3) years after the filing of the suit. The Appellant cannot legitimately complain of having been kept out of the succession proceedings whereas she did not take any remedial steps for about 3 years after learning of those proceedings.

28. The court is of the view that the most effective manner of challenging the Appellant's title which was obtained through a succession cause is by challenging the confirmation of the grant through appropriate proceedings upon learning of the existence of the succession proceedings. She was not at liberty to simply file a defence and counterclaim in a civil suit and then sit back. In my opinion, the basis or the root of the Respondent's title had not been challenged.

29. The 6th ground of appeal faulted the trial court for holding that it had no jurisdiction to cancel title to land. The court has perused the judgement of the trial court dated 8th February 2016. The main reason why the learned trial magistrate dismissed the Appellant's counterclaim was that the court thought that it had no jurisdiction to order cancellation of title.

30. The court agrees with the Appellant that the trial court erred in law on the question of jurisdiction. The court was probably misled by the Respondent's advocate who had submitted that the Magistrates' court had no jurisdiction to order cancellation of title. No authority was cited either by the Respondent or the court to support that proposition. So far as this court is aware, a gazetted Magistrate has jurisdiction to fully hear and determine environment and land matters and grant appropriate reliefs. See **NBI Civil Appeal No. 287 of 2016, The Law Society of Kenya Nairobi Branch Vs Malindi Law Society and 6 Others**. There is no restriction or qualification save as may be expressly provided for by law. One such exception would be an originating summons for a declaration that a person has become entitled to a particular parcel of land under **section 38 of the Limitation of Actions Act (Cap 22)**.

31. The court, however, notes that there was no prayer for cancellation of the Respondent's title in the counterclaim. The Appellant only sought a *declaration* of trust in her favour over the suit property and an order for her *registration* as proprietor. There was no prayer for determination of the pleaded trust or for cancellation of the Respondent's title. The court is, nevertheless, of the view that although the 6th ground has merit, the error by the trial court did not occasion any miscarriage of justice. Even if the trial court had appreciated that it had jurisdiction to cancel title to land, there was no adequate evidence on record which would have entitled the court to cancel the Respondent's title. This court has fully evaluated the evidence on record but is not satisfied that there is a basis for cancellation of the Respondent's title or for granting the reliefs sought in the counterclaim.

32. The 7th and 8th grounds of appeal faulted the trial court for having believed the Respondent's evidence and for giving judgement against the weight of evidence. For reasons given in the preceding grounds of appeal, the court finds no merit in these two grounds which challenge the trial court's evaluation of the evidence on record. The trial court only erred on a jurisdictional point of law which the court has held did not occasion a miscarriage of justice. The court is not satisfied that the trial court gave judgement for the Respondent against the weight of

evidence. Accordingly, the court finds no merit in the 7th and 8th grounds of appeal.

33. The court has noted that in her written submissions, the Appellant introduced a totally new ground, that is, that the trial court erred in failing to consider the provisions of **section 28 (b) of the Land Registration Act, 2012** which conferred upon the Appellant an overriding interest over the suit property. The said section recognizes rights acquired or in the process of being acquired under written law relating to limitation of actions by prescription.

34. The court notes that the issue of the Appellant having an overriding interest over the suit property was never pleaded in the Appellant's pleadings or canvassed at the trial. As indicated before, the learned trial magistrate could not be faulted for failing to consider an issue which was not pleaded or canvassed at the trial. This court cannot also consider a new ground of appeal which was not contained in the memo of appeal. No leave was granted to either amend the memo of appeal or to introduce the new issue. The new ground shall, accordingly, not be considered.

35. The upshot of the foregoing is that all the Appellant's grounds of appeal fail except the 6th ground. The court further finds that the error on jurisdiction on the part of the trial court did not occasion a miscarriage of justice. The court, therefore, finds no merit in the appeal and the same is consequently dismissed with costs to the Respondent.

36. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 25TH day of OCTOBER, 2018

In the presence of Ms Muriuki holding brief for Ms Rose Njeru for the Appellant and in the absence of the Respondent.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

25.10.18