



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC HIGH COURT APPEAL CASE NO. 20 OF 2015

GRACE GATHONI MATU & 3 OTHERS.....APPELLANTS

VERSUS

EPHANTUS KIHARA GUCHU.....RESPONDENT

Being an appeal from the whole of the Judgment decree and orders of the Hon. C.M Nzibe PM delivered at Malindi on the 18th day of March, 2015 in C.M.C.C. No. 110 of 2011 at Malindi

JUDGMENT

1. This is an Appeal arising from the Judgment of the Hon. C.M. Nzibe, Resident Magistrate Malindi delivered on 18th March 2015. The decision was the culmination of the hearing of Malindi CMCC No. 110 of 2011 wherein Ephantus Kihara Guchu (the Plaintiff) filed a case seeking Judgement against the Defendants for:-

i. General damages for breach of contract.

ii. A permanent injunction restraining the defendant from interfering with the Plaintiff's peaceful occupation and or enjoyment of the suit property and/or in the alternative the sum of Kshs 30,000/-

iii. The value/cost of a demolished house of Kshs 200,970/-

iv. Loss of future earnings from the demolished house and

v. Costs and interest.

2. Having heard the case, the Learned Resident Magistrate delivered the impugned Judgment in which he:-

i. Awarded the sum of Kshs 300,000/- to the Plaintiff for breach of contract and damage to the Plaintiff's house.

ii. Awarded as compensation the sum of Kshs 48,890/- as part of the costs incurred and proved in construction of the house on the suitland.

iii. Granted an order of a permanent injunction restraining the defendants from interfering with the Plaintiff's peaceful occupation and or enjoyment of the suit property.

iv. Awarded interest at Court rates in the sums awarded plus costs of the suit.

3. Aggrieved by the said decision, the Defendants-Grace Gathoni Matu, Mary Muthoni Mbugua, Leah Wambui Kimani, Josephine Muthoni Wamwea and Leah Wanjira Njoki (having been sued as officials of Multi-purpose Women Group now appeal against the decision. In their Memorandum of Appeal dated 9th April 2015, they fault the Courts decision on 12 grounds and pray that the Judgment, award and decree entered in favour of the Respondent (plaintiff) be set aside and substituted with an order dismissing the Plaintiffs case in the Lower Court.

4. This being a first appeal, this Court shall revisit the evidence adduced at the trial in order to determine whether or not the trial Magistrate properly directed himself before arriving at the contested decision.

5. The gist of the Plaintiff's claim in the Lower court was their contention that pursuant to an agreement entered into with the Defendants on or about 24th October 2007, the Plaintiff bought a parcel of land for a consideration of Kshs 30,000/- from the Defendants. Subsequently, the Plaintiff commenced construction on the parcel of land. It was further the Plaintiff's case that on or about 18th October 2010, the Defendants wrote a letter informing him to put a halt to the on-going construction works and further demanded demolition of the Plaintiff's house which he had already constructed on the land. The Plaintiff further avers that when he failed to do as demanded, the Defendants proceeded to trespass onto the suit property and demolished his house thereby subjecting him to loss and damage.

6. In their Statement of Defence, the Defendants contended that they were members of Mpeketoni Multi-purpose Women Group, which group had no capacity to be sued. They denied that the Plaintiff purchased a portion of the suit property and/or that the Plaintiff paid the sum of Kshs 30,000/- for the parcel of land as alleged.

7. At paragraph 7 of the Statement of Defence, the Defendants averred that the Plaintiff is the husband of Cecilia Kihara who was formerly the treasurer of their Mpeketoni Mutli-purpose Women Group in the year 2007. It was the Defendants' case that the Plaintiff's wife had during her stint as Treasurer aforesaid constructed a semi -permanent structure on the suit premises and she made the members of the Group believe that the house belonged to the Group. According to the Defendants, it was only after change of leadership that they discovered that the Plaintiff had colluded with his said wife to defraud the Women Group of its property.

8. During the trial, the Learned Trial Magistrate heard the testimony of two witnesses. The Plaintiff testified on his own behalf while the Defendants presented their evidence through their Chair Lady Grace Gathoni Wambugu.

9. In arriving at his decision to award Judgment to the Plaintiff/Respondent the Learned Trial Magistrate observed at pages 3 to 4 of the Judgment as follows:-

“The Plaintiff herein has shown that he purchased land from the defendant group herein vide an agreement dated 24/10/2007. The said agreement was signed by the Multi-purpose group officials and the land sold for Kshs 30,000/-. The Plaintiff did pay for the land and was issued with a receipt an an allotment letter. He produced receipts as Exh 5 totaling Kshs 48,890/- Once he completed construction in November 2011, the defendant through its representative new officials attempted to stop the Plaintiff from further construction on the suit land. The defendant went ahead and demolished the Plaintiff's house. The Plaintiff produced a photograph of the demolished house as Exh 7.

The defence produced minutes dated 7/7/2007 and under Minute 3/7/07 confirmed the intention by the group to sell the said land. They however stated that the Plaintiff had acquired the land fraudulently when his wife was an official of the group. They stated that the purchase receipt could not be authenticated neither could the minutes authorizing the sale of the suit land. They stated that there was no way the group's land could be sold by individuals without the group's consent.

The Agreement signed by the Plaintiff and the defendants for the sale of the land was produced in Court. The group officials signed the agreement in their official capacity and as representatives of the whole group. The defence witness did confirm that indeed prior to them taking office, the defunct officials were lawful officials and signatories to the group. She also confirmed the stamp on the agreement and that on the purchase receipt were those of the group. There was no evidence tendered to show that the same was procured fraudulently. Allegations of fraud must be strictly proved. Although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probability is required (see Gladys Wanjiru Ngacha –vs- AG Civil Appeal No 94 of 2009). It is my view that the fact that new officials took over and sought to clean house so to speak, does not necessarily negate dealings the group had through its former officials when they were lawfully in office.”

10. From the material placed before me, it is evident that the Learned Trial Magistrate aptly summarized the evidence as placed before him during the trial. The dispute revolves around a purported sale of an unregistered portion of land to the Plaintiff/Respondent by representatives of a Group of Women known as Multi-Purpose Women Group. From a copy of the alleged Sale Agreement between the Plaintiff and the said representatives(see pages 63 of the Record) the purchase price is indicated as Kshs 30,000/- but it is not clear how much the Plot said to be portion of the Women Group's land would measure. The heading to the agreement infers that it is somewhere on the Group Plot as it reads as follows:-

“Makubaliano Kati Ya Kamati Ya Multi-Purpose Women Group Na Ephatus Kihara Kuhusu Kumuuzia Plot Ya Kikundi iliyo Karibu na Choo.

11. Whatever the boundaries of the Plot was and its location, it is also apparent that the said sale did not go down very well with a section of the membership of the Women Group registered under the Department of Social Services in the Ministry of Labour, Social Securities and Services. This Section proceeded in a meeting to overturn the apparent decision of their office bearers to sell the land and caused the removal of the Plaintiff from the land, including the demolition of a house that the Plaintiff claims to have constructed on the land.

12. Aggrieved by the decision, the Plaintiff moved to Court and by a Plaint dated 14th June 2011, sued the then officials of the Women's Group namely:-

1. Alice W. Magu

2. Cecilia Kihara

3. Teresiah Wanjohi

4. Hellen Muthoni and

5. Leah Wanjira Njoki

13. As it turned out the 2nd Defendant Cecelia Kihara who was then the Group Treasurer also happened to be the Plaintiff's wife. In the resultant dispute, the Appellants herein accused her of conspiring with her Respondent husband to deprive the group of a portion of their land as, according to them, the sale had not been sanctioned by the general membership of the Group.

14. In the meantime, the dispute in the Women's Group escalated leading to the convention of a general meeting in which new officials were elected to replace the Committee that served with the 2nd Defendant. The Plaintiff then moved to amend the Plaint and sued the new office bearers (the Appellants herein) leading to this appeal.

15. From the Plaint filed in the Lower Court as amended by an order of the Court issued on 25th April 2013, it is evident that even though the Appellants herein were brought in as the new officials of the Multi-Purpose Women Group, there was no suit against them individually. This is so because Paragraph 2 of the Amended Plaint states as follows:-

2. The Defendant is a Society registered under the Societies Act Cap 108 Laws of Kenya. (Summons herein shall be served through the Plaintiff's Advocates Office).

16. Be that as it may by a Memorandum of Appearance dated 16th May 2013, Grace Gathoni Matu, the new Chair of the Group entered appearance "for all the defendants in the suit". By a Written Statement of Defence dated the same day she also tendered a defence on behalf of "all the Defendants". At paragraph 3 of the Plaint, they state as follows:-

3. The Defendants deny the content of Paragraph 2 of the amended Plaint and aver that they are members of Mpeketoni Multi-Purpose Women Group, which has no capacity to be sued."

17. It would appear to me that this assertion by the Appellants herein was treated in the trial Court as a mere denial and the question was not properly interrogated. As a result, there was nothing on the record to show whether the said Mpeketoni Multi-Purpose Women Group was a society registered as contended by the Plaintiff/Respondent under the Societies Act and/or whether it had capacity to sue and be sued.

18. From the material placed before me, the said Mpeketoni Multi-Purpose Women Group appears to me to have been nothing but a community Self Help Group registered as such under the Department of Social Services. No Constitution of the Group was availed to the Court and it was not clear how many its members were. From a letter dated 16th November 2016 authored by the Lamu County Coordinator for Social Development and addressed to the Manager ABC Bank, it is evident that the Appellants have also since been replaced as officials following elections that were conducted on 16th June 2016.

19. In my mind, a number of individuals may come together and form an identifiable group. They may take action as a group but that does not mean that the group is now vested with legal capacity to sue and to be sued. Unincorporated entities have no legal capacity and cannot therefore sue or be sued in their own names. Mpeketoni Multi-Purpose Women Group was one such entity.

20. Arising from the foregoing, I did not consider that I needed to look at any other of the 12 grounds of appeal listed herein. In the circumstances, the Judgment, award and decrees entered in favour of the Respondent is hereby set aside and is instead substituted with an order striking out the Plaintiff's case in the Lower Court.

21. The Appellants shall have the costs of this Appeal.

Dated, signed and delivered at Malindi this 14th day of December, 2018.

J.O. OLOLA

JUDGE