



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CIVIL APPEAL No. 91 OF 2015

GATEMBE NGUMI KAGOAPPELLANT

VERSUS

MARY MUTHONI KAMAU RESPONDENT

JUDGMENT

(An appeal against judgment of the subordinate court delivered in CMCC No. 1926 of 2004 (Nakuru) Harun Kamau –vs- Gatembe Ngumi Kago; appeal dismissed)

1. Being dissatisfied with the judgment of Hon. M. I. G. Moranga Principal Magistrate delivered on 24th June 2015 in CMCC No. 1926 of 2004 (Nakuru) Harun Kamau –vs- Gatembe Ngumi Kago, the appellant filed the present appeal on 16th July 2015. The grounds of appeal are listed in the Memorandum of Appeal dated 16th July 2015 according to appellant’s numbering as follows:

01.0. The Honorable trial court erred in law and in fact in arriving at and making its judgment in favour of the plaintiff without considering the effect of section 159 of the registered Land Act 300 Laws of Kenya denying the Honorable trial court any tinge of jurisdictions if at all thus rendering the said same judgment given on 21.06.2015 null and void ab initio.

02.0. The honorable trial court erred in law and in fact in arriving at and making its judgment contrary to and in pervasion to the admission by the plaintiff that the suit property registration number Nakuru Municipality/Block 1/1848 was procured under calculated deceitful and fraudulent alienation of the title of unto the plaintiff.

030.0 The honourable trial court erred in law and in fact in arriving at and making its judgment that legalized the admission and confessions by the plaintiff that failed to produce and proof his alleged registration and alienation of the suit property registration number Nakuru Municipality/Block 1/1848 was not deceitfully and fraudulently alienated unto the title of the plaintiff.

04.0. The honorable trial court erred in law and in fact in arriving at and making its judgment in favour of the plaintiff using an abated suit more than four years after the suit had abated creating time bar on litigation pursuant to section 4 of the Limitations Act chapter 22 of the Laws of Kenya.

05.0. The honourable trial court erred in law and in fact in arriving at and making judgment in favour of the plaintiff without and before determination of the:

05.10. The Notice of Motion application by the defendant dated 10th day of November 2008 by the

defendant seeking to dismiss the suit for want of litigation consequent to failure of substitution of the plaintiff mandatory within one year after death of the said same plaintiff;

05.20. The fatally and incurably incompetent Notice of Motion application dated 13th day of March 2014 based on the incurably and on the fatally defective Notice of Change of Advocate dated 13th day of March 2014 which omit to disclose the name and signature of the author in breach section 35 (1) of the Advocates Act chapter 16 Laws of Kenya.

06.0. The honourable trial court erred in law and in fact in arriving at and making its judgment in favour of the plaintiff without and before determination of the: without considering appreciating and applying the evidence contained in the (sic):

06.10. Letter dated 31st May 2004 from the Municipal Council of Nakuru allocating the said same suit plot unto the defendant:

06.20. Minute number 105 of the meeting of the Town Planning Committee of the Municipal Council of Nakuru held on Friday the 21st March 2004 at 10.00am which allotted the suit plot unto the defendant to wit:-

“Minute 105 CONSENT OF BLOCK 1/1848 AND 1855 KIMATHI WAYLEAVE

Councilor Gikaria informed the meeting that the people on the ground were allocated the sites in 1985 to put up charcoal stores. He asked the council to formalize their allocation as plots to those on the ground.

THAT The council to formalize the allocation of Block 1/1848 and 1851 to the people who have constructed temporary structure there at.”

06.30. The letter dated the 14th June 1993 reference GP/6/92/JNM/APW/GP/6/DA/5/E addressed to Gatembe Ngumi Kago (read Kigo) P.O Box 522, Nakuru on Temporary Occupation – Site for charcoal store which at item number 5. States to wit:-

“5. The allottee shall not sell, sublet or charge the land or part with possession of the land or any building thereon except with the prior consent of the Town Clerk.

Yours faithfully

J. Ndonga

For Town Clerk

Cc: Town Engineer

Chief Health Officer.”

evidence enough on the court record on who between the plaintiff on one part and the defendant on another part who the legal owner to the suit property registration.

07.0. The honourable trial court erred in law and in fact in arriving at and making its judgment in favour of the plaintiff without and before determination of the fact that the plaintiff was entitled to the protection under the adverse occupation having occupied the site w.e.f 1988 to 15.09.2004 date the suit got instituted by the plaintiff.

08.0. The honourable trial court erred in law and in fact in arriving at and making its judgment in

favour of the plaintiff without and before determination of the in total breach justice and equity plus infringement and violation of the rights and freedoms of the defendant.

09.0. The honourable appellate court has the jurisdiction power and discretion to grant the prayers and issue the orders sought.

The appellant sought the following orders:

1. That the judgement of the honourable trial court given on 21.06.2015 in Nakuru CMCC1926/2004 be and is hereby declared lacking jurisdiction fit to be reversed and rescinded and vacated forthwith in the interests of justice and equity.

2. That the deceitfully and fraudulently (sic) registration and alienation of the subject suit plot registration number Nakuru Municipality/Block 1/1848 be declared illegally alienated unto the respondent fit to be nullified and void ab initio forthwith.

3. That the Nakuru District Land Registrar be and is hereby ordered to effect forthwith the registration and alienation of the subject suit plot registration number Nakuru Municipality/Block 1/1848 be and is hereby ordered to be in the title and style of GATEMBE NGUMI KAGO I/D NUMBER 4271251 P.O Box number 522-20100 Nakuru forthwith ab initio (sic).

And an orders (sic) that the costs incidental to the Civil Suit number Nakuru CMCC 1926/2004 the costs incidental to this appeal be condemned upon the respondent.

2. The record of appeal was filed on 29th July 2016 and the appeal was admitted to hearing on 24th October 2016. When the appeal came up for hearing before me parties agreed to proceed by way of written submissions. Accordingly, counsel for the appellant filed submissions on 10th April 2017 while counsel for the respondent filed submissions on 21st April 2017.

3. The appeal was filed by the appellant in person. Counsel for the appellant distilled the appellant's rather lengthy grounds of appeal into three grounds. Firstly, that the trial magistrate lacked jurisdiction in view of the provisions of Article 162 (2) of the constitution of Kenya, 2010. Counsel argued that as at 24th June 2015 when the court delivered the judgment the jurisdiction of the subordinate court had been taken away by the constitution which created the Environment and Land Court and that the judgment is null and void since the trial court lacked jurisdiction to hear and determine land matters.

Secondly, counsel argued that the suit had abated and that it was never reinstated. Finally, it was argued for the appellant that the judgment of the trial court had certain errors on its face which made it contradict the pleadings and which resulted in serious ambiguity. Counsel cited as an example that the suit land was described as plot No. 16 Unway-leave now known as Nakuru Municipality Block 1/1848 Langalanga yet the amended plaint did not describe it as such. In conclusion, counsel urged the court to set aside the judgment of the subordinate court and to dismiss the case with costs.

4. For the respondent it was submitted that the issue of the suit having abated cannot be raised now as the subordinate court made an order reviving the suit on 8th May 2014 and that the appellant who was present in court on that date did not object to the suit being revived.

Regarding the appellant's contention that the subordinate court lacked jurisdiction, counsel for the respondent argued that the issue of jurisdiction was neither one of the grounds of appeal nor was it raised before the subordinate court. In any case, counsel submitted, the case was filed in the year 2004 and the court had jurisdiction then.

Finally, counsel submitted that since there is no dispute that the respondent has a valid lease issued by the government, the respondent is thus a registered proprietor who is entitled to the protection accorded to a registered proprietor by both the constitution of Kenya, 2010 and the Land Act, 2012. That the appellant

cannot claim ownership or adverse possession on the basis of a temporary licence issued by the Municipal Council of Nakuru. In conclusion counsel argued the court to dismiss the appeal with costs.

5. I have considered submissions made on behalf of both parties as well as authorities cited. I have also had the benefit of reading the original record of the subordinate court. I will address the three broad grounds of appeal as narrowed down by counsel for the appellant; firstly whether the trial magistrate lacked jurisdiction in view of the provisions of Article 162 (2) of the constitution of Kenya, 2010; secondly whether the suit in the subordinate court had abated and was not reinstated; finally, whether the judgment of the trial court had errors on its face which made it contradict the pleadings and which resulted in serious ambiguity.

6. Article 162 of the Constitution of Kenya, 2010 states:

(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

7. To effect the provisions of article 162 (2) (a) of the Constitution of Kenya, 2010 parliament enacted the Environment and Land Court Act, No, 19 of 2011 (ELC Act) and the President assented to it on 27th August 2011. The Environment and Land Court was established pursuant to section 4 of the Act and was clothed with jurisdiction to determine all disputes concerning the environment and use, occupation of and title to land. Nevertheless, the drafters of the constitution provided a transition mechanism for dealing with pending matters. That mechanism is found at section 22 of the Sixth Schedule of the Constitution titled Transitional and Consequential Provisions. It states:

22. Judicial proceedings and pending matters

All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court.

8. The suit herein was filed on 13th September 2004 and it was still pending before the subordinate court as at 27th August 2010, the effective date when the Constitution came into force. Consequently, the subordinate had jurisdiction. The ground of appeal on jurisdiction is dismissed.

9. Now to the second ground advanced by the appellant: that the suit in the subordinate court had abated and was not reinstated. A perusal of the record of the subordinate court shows that the respondent on 19th March 2014 the respondent filed a Notice of Motion dated 19th March 2014 seeking substitution and reinstatement. When the application came up for hearing on 8th May 2014 the appellant personally told the court that he was not opposing the application. Consequently, the application was allowed, effectively substituting Mary Muthoni Kamau as the plaintiff and reviving the abated suit. Having actively participated in the proceedings of 8th May 2014 and having supported the substitution and reinstatement, the appellant is estopped from challenging the orders emanating from those proceedings. The ground of appeal on the issues of abatement, substitution and reinstatement is dismissed.

10. The last ground of appeal is that the judgment of the trial court had errors on its face which made it

contradict the pleadings and which resulted in serious ambiguity. It was submitted on behalf of the appellant that an example of the errors and contradictions is that the suit land is described as plot No. 16 Unway-leave now known as Nakuru Municipality Block 1/1848 Langalanga yet the amended plaint did not describe it as such. The appellant did not however address the court on how such ambiguities affect decision of the subordinate court. The court was also not addressed on whether such ambiguities could be cured through sections 99 or 100 of the Civil Procedure Act.

11. I have perused the amended plaint. The prayers mention plot No. 16 Unway-leave Nakuru Municipality Block 1/1848. The respondent produced as Exhibit P3 a copy of certificate of lease showing that the land was registered as Nakuru/Municipality Block 1/1848 (Langalanga). The court had a duty to word the final orders in such a way as to address the real issues before it and be enforceable. The magistrate states as follows in the judgment:

From the evidence availed I note that the plaintiff has established that he obtained a transfer of the land parcel number Nakuru Municipality block - UN WAY LEAVE 16 from one Michael Ohadha.

From the letter of allotment it shows letter for allotment was on 27th February, 1997. The land was then transferred to the plaintiff (now deceased). On 7/4/1998 (exhibit P2) the Municipal Council of Nakuru approved the said transfer and a certificate of lease issued on 28th June 2002, exhibit P3. The land was later to be referred to as Nakuru/Municipality Block 1/1848 (Langalanga) ...

I find no errors or ambiguity on the face of the judgment.

12. As previously stated, I have reviewed the entire record of the subordinate court. The deceased was the registered proprietor of a leasehold interest in Nakuru/Municipality Block 1/1848 (Langalanga) pursuant to Certificate of Lease dated 28th June 2002. He therefore enjoyed the full protection of law accorded to a registered proprietor. The learned magistrate cannot in the circumstances be faulted for finding in favour of the respondent.

13. In the end I dismiss the appeal with costs to the respondent.

Dated, signed and delivered in open court at Nakuru this 30th day of May 2017.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the appellant

Mr. Geke holding brief for Mr. Kiburi for the defendants

Court Assistant: Gichaba