



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT EMBU

ELC CASE NO. 3 OF 2017

CHRISPIN KIENYU KANG'ETHE..... APPELLANT

VERSUS

EPHANTRUS NJIRU MBOGO.....RESPONDENT

DORCAS NJIRU MUGO.....INTERESTED PARTY

J U D G M E N T

1. By a Plaint dated and filed on 21st November 1994 the Respondent, Ephantus Njiru Mbogo filed a suit against the Appellant herein, Crispin Kiengu Kangethe, in Embu PMCC No. 462 of 1994. It was pleaded that the Appellant had refused to vacate the Respondent's parcel of land **KAGAARI/WERU/1168** despite permission for continued stay having been terminated and the Appellant being required to vacate.

2. The Respondent pleaded in the aforesaid civil suit that he was the registered owner of the said parcel of land and that he had allowed the Appellant to reside on part of the land as a service tenant whose services had long been terminated. The Respondent therefore sought the following orders against the Appellant:

- a) *General damages*
- b) *Declaration that parcel No. **KAGAARI/WERU/1168** belonged to him.*
- c) *Eviction order*
- d) *Vacant possession*
- e) *Costs*
- f) *Interest*
- g) *Any other relief*

3. The Appellant filed a defence and counter claim to the action claiming a portion of 12.83 ha of the Respondent's land on account of a sale agreement between the parties made on some unspecified date in 1980. He therefore pleaded that he was lawfully in occupation of the suit property as a *bonafide* purchaser for value.

4. The Appellant further pleaded that he had suffered loss as a result of the Respondent's failure to transfer the said portion of land to him and he consequently sought the following orders against the

Respondent in that suit;

- a) *An order for transfer of 12.83 acres out of parcel No. **KAGAARI/WERU/1168** free of any encumbrances.*
- b) *Alternatively, an order for the executive officer of the court to sign all the relevant documents to effect transfer to him.*
- c) *Costs of the suit.*
- d) *Any further relief the court may deem fit to grant.*

5. When the suit came up for hearing on 16th July 2008 before the learned magistrate Hon. E.K. Nyutu (RM), the Plaintiff did not turn up for trial in consequence of which his suit was dismissed for non-attendance.

6. The court proceeded to hear the Appellant's counter claim. The Appellant, himself and closed his case. The counterclaim was set down for judgment on 1st October 2008. However, it would appear that judgment was not delivered until 12th November 2008 or thereabouts when the Appellant's counterclaim was dismissed with costs.

7. The Appellant was aggrieved by the said judgment in consequence of which he filed the instant appeal being Embu HCCA No. 19 of 2014. The said appeal was filed out of time with leave of court.

8. The Appellant raised 6 grounds of appeal as shown in the memorandum of appeal attacking the judgment of the learned trial magistrate. It was stated that the trial court had erred in law and in fact in;

- a) *Failing to arbitrate the issues before her but instead acted as counsel for the Respondent .*
- b) *Failing to accept the Appellant's exhibits whereas the same were not objected to.*
- c) *Failing to give arguable reasons for dismissing the counter claim.*
- d) *Failing to follow the Appellant's case properly and thereby arriving at a wrong conclusion.*
- e) *Basing her judgment on trivial reasons and thereby failed to give due consideration to the Appellant's longevity of occupation and the purchase price he had paid.*
- f) *Confusing herself with the value of the land whereas the Appellant was certain of the value as contained in the sale agreement.*

9. It would appear from the record that upon conclusion of the case Respondent sold the suit property to the interested party Dorcas Njagi Mugo, in 2012 for a consideration of Ksh. 2,000,000/=. However, the interested party could not have the suit property transferred into her name due to a caution which had been lodged by against the title by the Appellant and his children.

10. The interested party consequently filed an application dated 21st September 2015 to be joined in this appeal as an interested party. It would appear that the said application was granted.

11. It would also appear from the court record that the parties agreed to dispose of the pending appeal through written submissions. Consequently, the firm of Gacheru J. & Co. Advocates for the Appellant filed their submissions on 15th November 2016 whereas the firm of P.N. Mugo & Co. Advocates for the Respondent and the interested party filed theirs on 23rd November 2016.

12. This court is aware of the duty of the first Appellate court as a duty of the first appellate court in an

appeal of this nature. See *Associated Motor Boat Co. Ltd vs Selle* [1968] EA 123.

The first appellate court has a duty to appraise the entire evidence before the trial court and undertake its own evaluation thereof with a view to satisfying itself as to the correctness or otherwise of the judgment of the trial court.

13. The Appellant decided to argue all the 6 grounds of appeal in a nutshell contending that they were all related. The Appellant argued that the counterclaim ought to have been allowed as prayed since it was not defended. It was further argued that the copies of documentary evidence being a copy of a sale agreement (exhibit D2) and the copy of the Land Control Board consent (exhibit D3) ought to have been accepted as such since there was no objection to their production.

14. The Appellant further submitted that the trial court failed to “tabulate” the evidence adduced by the Appellant in violation of the legal requirements for preparation of judgments. The omission, it was submitted, caused the trial court to arrive at an erroneous judgment.

15. The Appellant finally submitted that the trial court failed to consider the longevity of the Appellant's occupation of the suit premises. According to the Appellant such lengthy occupation could only be on the basis of a sale agreement. The Appellant, therefore, urged the court to allow the appeal, set aside the judgment of the trial court dismissing the counterclaim and enter judgment for the Appellant as sought in the counterclaim.

16. The Respondent and the interested parties do not appear to have filed either replying affidavits or grounds of opposition in this appeal. However, it is clear from their written submissions that they are opposing the appeal on various grounds of law and fact.

17. Among the grounds of objection raised in the Respondent's submissions are that;

- a) *The Appellant's counterclaim was statute barred under the Limitations of Actions Act (cap. 22).*
- b) *There was no evidence or proper evidence of the consent of the LCB having been granted.*
- c) *There was no evidence or proper evidence adverse possession by the Appellant.*
- d) *There was no evidence of a sale agreement between the parties.*
- e) *There were various contradictions on the amount of the purchase price allegedly paid for the land.*
- f) *The copies of the purported sale agreement and the minutes of the LCB were not admissible in law.*

18. According to the record, the Appellant gave very brief evidence at the trial of the counterclaim. The evidence is recorded pages 27 and 28 of the record of appeal. His evidence was simply that he purchased a portion of 12.83 acres out of the Respondent's parcel of land No. 1168 in 1980. He stated that the agreement was in writing and that he paid a sum of Kshs. 10,000/= for the land. He further testified that he obtained the consent of the relevant Land Control Board but the Respondent had refused to transfer the land to him. He stated that he had been in occupation of the suit property since 1981.

19. It is clear from the record that the Appellant produced a faded copy of what he called a sale agreement (Exhibit D2) on the basis that the original was lost. The Appellant also produced a photocopy of what he called the consent of the Land Control Board (Exhibit D3) but it was a copy of minutes of a Land Control Board meeting held on an unclear date in October 1980. The Appellant's exhibit No. 1 was a copy of an official search for suit property which showed the registered proprietor.

20. The learned trial magistrate dismissed the counterclaim on 3 grounds. First; There was a discrepancy

in the Respondent's name since he was described in the plaint as Ephantus Njiru Mbogo whereas the certificate of official search for parcel No. 1168 referred to one Ephantus Njiru Gedion Mungai. The court was, therefore, uncertain if the two sets of names referred to one and the same person.

21. Second, the copy of the purported sale agreement was not certified as a true copy of the original and that it was not, in fact, a copy of a sale agreement but a copy of something like a payment voucher merely acknowledging of Ksh. 10,000/= from the Appellant. In the trial court's view it did not constitute a sale agreement.

22. The third reason was that the trial court found that the copy of the minutes of the Land Control Board were not admissible since they had not been certified to be a true record. The court was, therefore, cautious not to rely on a document of doubtful authenticity.

23. The first ground of appeal alleging that the learned trial magistrate failed to arbitrate on the counterclaim but instead took up the role of the Respondent's counsel is unfounded and unproven. On the basis of the evidence on record, there was an adjudication on the issues as she understand them. There is no evidence of her inclination towards the Respondent.

24. The second ground related to admission and acceptance of at least two exhibits, that is, the copy of the sale agreement and the copy of minutes of the Land Control Board. It has been contended by the Appellant that since they were not objected to (as the Respondent was absent) they ought to have been accepted at face value. The record actually shows that they were indeed admitted as defence exhibits D2 & D3 but the trial court appeared to have given them no or no significant probative value.

25. I do not understand the record to show, as contended by the Appellant, that the trial court first accepted the two exhibits during the hearing and then rejected them later at judgment stage. The trial magistrate simply acted with caution in relying upon photocopies which were not certified or properly certified. On the basis of section 33 of the Evidence Act, (CAP 80), the purported sale agreement was for rejection since no proper evidence on basis was laid for its production as secondary evidence. It was not sufficient for the Appellant to make a bare statement that the original was lost.

26. A scrutiny of the said document, which is barely legible, reveals that it is not actually a sale agreement but a faded copy of something similar to a cash sale receipt purporting to acknowledge receipt of Ksh. 10,000/=. The other details thereon are unclear. In those circumstances, the probative value of such an unclear document must be very low. The learned trial magistrate cannot therefore be faulted for the manner in which she handled the exhibit.

27. There is a big difference between a certified true copy of a public document and a copy of a certified true copy of such a document. The former is admissible under section 69 of the Evidence Act (cap 80) whereas the latter is not. The copy of the minutes of the Land Control Board which the Appellant produced as exhibit D3 was merely a copy of a certified true copy. It was not admissible in the first instance, but having been admitted, the trial court was at liberty to sign an appropriate level of probative value depending on the authenticity of the document. Again, the trial court cannot be faulted for assigning such low probative value to the copy of the minutes.

28. The court does not agree with the Appellant's submission that documents whose production is not objected to, for whatever reason, should be admitted in evidence regardless of the rules of evidence or that once admitted they should be accorded maximum probative value. A court of law is obligated to ensure that uniform rules of evidence apply regardless of whether a party is represented by an advocate or not and regardless of whether or not a technical objection is raised to the violation of the law.

29. The third ground of appeal relates to the alleged failure by the trial court to give plausible reasons for dismissing the counterclaim. It should be remembered that in civil cases, the fact that a claim or counter claim is not defended at the hearing does not necessarily mean that it shall automatically succeed. The party who seeks judgment in his favour shall still be required to prove his case on a balance of probabilities. However, in the circumstances of this particular appeal the trial court actually gave reasons

for the dismissing the counterclaim. They are in the judgment. So this ground of appeal has no merit and the same is dismissed.

30. On the fourth ground, there is no evidence on record to show that the trial court failed to follow or appreciate the Appellant's counterclaim and that as a result, the court arrived at a wrong decision. This ground of appeal also fails.

31. The fifth ground faulted the trial court for allegedly basing the judgment on trivial reasons and failing to give due consideration to the Appellant's longevity of possession and the payment of the purchase price. The Appellant's submissions that such longevity of occupation can only inevitably lead to the conclusion of existence of a sale agreement or a valid sale agreement must be rejected. It is possible for such possession to lead to a conclusion of say adverse or even consent or licence of the registered owner. There was no claim or counterclaim for adverse possession for consideration by the court. In my view, there is no merit in this ground of appeal and the same is hereby dismissed.

32. The sixth ground of appeal is hardly clear and it was not elaborated upon in the Appellant's written submissions. This ground therefore fails since it was not argued.

33. The Appellant also raised one additional issue in his written submissions which was not contained in the memorandum of appeal. This issue related to the alleged failure of the trial magistrate to follow the prescribed mode of preparation of judgments under the Civil Procedure Rules. I have perused the judgment and it is true that it does not strictly comply with 0.21 rule 4 of the Civil Procedure Rules on the contents of a judgment. However, there was no prejudice suffered by the Appellant since the omission did not occasion a miscarriage of justice.

34. The Respondent has raised a ground of objection relating to the Limitation of Actions Act on the basis that the Appellant's action was in any event statute barred by the time of filing his counterclaim in 2004 or 2005. Although there is considerable force in this ground, I note that it was neither pleaded in the Defence to counterclaim nor argued before the trial court. It is a completely new ground and it would not be to base this judgment on such ground.

35. The upshot of the foregoing is that all the Appellant's grounds of appeal have failed with the consequence that the appeal is hereby dismissed with costs.

It is so adjudged.

Judgment dated, signed and delivered in open court at Embu on 11TH day of MAY, 2017.

ANGIMA Y M

ELC JUDGE