REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 30 OF 2013

JANE WAMUNYU……...……APPELLANT

VERSUS

JACOB GITHINJI SHADRACK…….....…1ST RESPONDENT

JOYCE KANINI SHADRACK……..…..……2ND RESPONDENT

DAMARIS CIAKUTHI SHADRACK…….…...…….3RD RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT WANGU'URU (HON. B.M. OCHOI) IN CIVIL CASE NO. 160 OF 2010 DELIVERED ON 12TH JULY 2011)

JUDGMENT

The Respondents herein (as plaintiffs) moved to the Wanguru Senior Resident Magistrate's Court at Wanguru vide Civil Case No. 160 of 2010 seeking judgment against the Appellant (as defendant) in the following terms:

1. ***A permanent injunction restraining the Appellant from entering, remaining on, cultivating, building or in any other way interfering with land parcel No. MWEA/NGUCUI/618.***

2. ***Costs and interest.***

The basis of the Respondents' case was that they are administrators of the Estate of the late **SHADRACK GITHINJI NJARUIRI** who was the registered owner of land parcel No. MWEA/NGUCUI/618 (the suit land) but the Appellant had illegally entered thereon and was cultivating it and had also attempted to build a temporary structure thereon.

The Appellant who was then acting in person filed a defence denying those averments and seeking the dismissal of the suit.

The case was heard by **B.M. OCHOI** Senior Resident Magistrate who after considering the evidence adduced by the three Respondents and the Appellant entered judgment in favour of the Respondent on 12th July 2011.

That judgment provoked this appeal which was filed on 12th August 2011 and was admitted by **ONG'UDI J**. on 29th December 2011 in which the Appellant, through the firm of **MAGEE WA MAGEE** Advocates, advances the following grounds while seeking to set aside the said judgment:

1. That the learned magistrate erred in law and fact in making judgment against the weight of evidence.

2. That the learned magistrate erred in law and fact in failing to find that the Appellant had acquired the suit land by virtue of adverse possession of the same for more than 30 years.

3. That the learned magistrate erred in law and fact in disregarding the contradiction and inconsistencies in the evidence adduced by the Respondents.

4. That the learned magistrate erred in law and fact in failing to find that the Respondents did not prove their case on a balance of probabilities.

5. That the learned magistrate erred in law and fact in unfairly disregarding the evidence adduced by the Appellant.

6. That the learned magistrate erred in law and in fact in failing to find that he had no jurisdiction to hear and determine a matter relating to trespass to land under the provisions of the Land Disputes Tribunal Act No. 18 of 1990.

The appeal was canvassed by way of written submissions which have been filed by **MAGEE WA MAGEE** advocates for the Appellant and **ANN THUNGU** advocate for the Respondents.

This being a first appeal, the role of this Court is to re-consider and evaluate the evidence that was before the trial Court and draw my own conclusions. In doing so, I must always bear in mind that I neither saw nor heard the witnesses and make due allowances for that – ***SELLE VS ASSOCIATED MOTOR BOAT COMPANY LTD 1968 E.A 123***. I must also appreciate that as an appellate Court, I should not necessarily interfere with the findings of fact by the trial Court unless they were based on no evidence at all or on misapprehension of it or the trial Court is shown to have acted on wrong principles – ***MWANASOKONI VS KENYA BUS SERVICES LTD 1982-88 I K.A.R 278***. See also ***KIRUGA VS KIRUGA & ANOTHER 1988 K.L.R 348***.

The Respondents' case in the trial Court was fairly straight forward. The 1st Respondent is son of the deceased **SHADRACK GITHINJI NJARUIRI** while the 2nd and 3rd Respondents are the deceased's wives. The suit land remains to-date registered in the names of the deceased as per the original title deed dated 5th May 1999 and which was tendered in evidence by the Respondents. Their case was that after they took possession of the suit land, there were squatters who vacated but the Appellant refused to vacate and cultivates 1/8 of an acre where she has put up a temporary structure. That the Appellant had tried to bury her son on the suit land in 2004 but the Respondents resisted by filing Civil Case No. 467 of 2004 at Kerugoya Court. The Appellant's case was that she had lived on the suit land for over 30 years having been given documents by the then Kirinyaga County Council allowing her to live thereon.

In my view, this appeal can be determined by considering the following three (3) broad grounds:

1. That the magistrate erred in law and fact in failing to find that the Appellant had acquired the suit land by virtue of adverse possession of the same for over 30 years.

2. That the learned magistrate erred in law by failing to find that the Respondents did not prove their case and gave contradictory and inconsistent evidence and further, that the trial magistrate unfairly disregarded the Appellant's evidence.

3. That the magistrate erred in law and fact in failing to find that he had no jurisdiction to hear and determine a matter relating to trespass to land under the provisions of the Land Disputes Tribunal Act No. 18 of 1990.

I will therefore consider those three (3) condensed grounds.

On the ground that the trial magistrate erred in law and in fact in failing to find that the Appellant had acquired the suit land by virtue of adverse possession, it is trite law that only the High Court, and since 2012 the Environment and Land Court, can grant orders in adverse possession. ***Section 38(1) of the Limitation of Actions Act*** provides that:

> ***"Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land***". Emphasis added

Therefore, only this Court would have the jurisdiction to grant orders in adverse possession and the subordinate Court does not enjoy such jurisdiction. In any event, and unfortunately so because the Appellant was acting in person, there was no counter claim made by the Appellant with respect to the suit land and therefore, even if the trial Court had such jurisdiction, it would not have granted orders that were not sought in the pleadings. There was therefore no error in law and fact on the part of the trial magistrate in not making any finding on the issue of adverse possession. That would have amounted to acting without jurisdiction. That ground therefore fails.

The other grounds are that the trial magistrate acted against the weight of the evidence and failed to find that the Respondents did not prove their case and their evidence was contradictory and inconsistent. As indicated above, the Respondents' case in the trial Court was fairly straight forward and the moment they produced the title deed to the suit land in the names of the deceased, it was always going to be a herculean task for the Appellant to dislodge the Respondents' claim to the suit land. This was not made easier by the fact that the Appellant was acting in person and had neither made a counter claim nor even alleged any fraud on the part of the Respondents in the manner in which the title deed was issued in the names of the deceased.The Appellant hinged her case in the trial Court principally on two grounds the first being that she had lived on the suit land for over thirty (30) years and secondly, on the basis of a letter dated 15th May 2006 addressed to the Chairman of Mwienderi Water Project by the then County Council of Kirinyaga. That letter reads as follows:

> ***"RE: JANE WAMUNYU MUCHIRA***
>
> ***This is to confirm that the above named person was allocated a parcel of land by the Council vide minute No. WTP & H 20/96.***
>
> ***Therefore as far as the Council is concerned, she has a right of occupation of that land until it is well surveyed/demarcated. Therefore please accord her the necessary assistance***
>
> ***(G. Karimi)***
>
> ***For Ag. Clerk to Council".***

The minutes of the meeting being referred to in the above letter were not part of the Appellant's evidence in the trial Court and so it is not clear when and what parcel of land was allocated to the Appellant. The fact however is that as long as the suit land was registered in the names of the deceased, it could not have been available for alienation to the Appellant or any other person for that matter. The County Council of Kirinyaga certainly had allocated the Appellant some parcel of land but that could not have been the suit land because the moment the title thereto was issued in the names of the deceased, he and his successors in title were entitled to all the rights and privileges protected by ***Sections 24, 25 and 26 of the Land Registration Act*** unless there was evidence that the title was obtained through fraud or other illegal means. Indeed all this was considered by the trial magistrate who observed as follows in his judgment:

> ***"…… the defendant claims that she has been in occupation of the land for over 30 years however she did not produced (sic) any document to justify her claim, the letter she produced (Defence Exhibit No. 1) from the County Council seems to be of no consequence. It was written in the year 2006, purporting that the land in question had not been demarcated/surveyed but***

clearly the title deed to the said land was issued in the year 1999 and this must have been after survey. I wish to note at this juncture that the defendant stated that she didn't know the parcel No. of her plot and therefore tend to think that the letter from the County Council (Defence Exhibit No. 1) must have been referring to a different parcel of land"

It cannot therefore be true that the trial magistrate disregarded the Appellant's evidence or that he made a judgment against the weight of the evidence or that the Respondents failed to prove their case on a balance of probabilities. I have not seen any contradictions or inconsistencies in the evidence of the Respondents which I find was cogent enough to prove their case as required in law. Those grounds of appeal must also collapse.

Finally, the Appellant has questioned the jurisdiction of the trial magistrate in handling a dispute relating to trespass under the provisions of the ***Land Disputes Tribunal Act No. 18 of 1990 (now repealed)***. The suit in the subordinate Court was filed in October 2010 a year before the repeal of the ***Land Disputes Tribunal Act No. 18 of 1990*** which, under ***Section 3(1),*** gave the powers to determine disputes involving boundaries to land, claim to occupy or work land or trespass to land to the Land Disputes Tribunal. However, the Respondents' claim in the subordinate Court, as I have pointed out at the beginning of this judgment, was for an order of permanent injunction to restrain the Appellant from entering, remaining on, cultivating, building or in any way interfering with the suit land. That was a matter well within the jurisdiction of the subordinate Court. It is now well settled that the Land Disputes Tribunal had no jurisdiction to deal with a dispute involving a claim to registered land – ***JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL & ANOTHER C.A CIVIL APPEAL No. 256 of 2002 (KISUMU***). The dispute between the parties herein was a dispute over ownership of registered land and there was nothing to suggest that the value of the land was **not** within the pecuniary jurisdiction of the trial magistrate. Indeed, the Appellant in paragraph five (5) of her defence stated as follows:

"The defendant admits this Court has jurisdiction to hear and determine this suit"

Of course jurisdiction cannot be conferred by the parties to a suit. However, the trial Court clearly had the jurisdiction to determine the dispute before it because it involved ownership of registered land and was therefore outside the purview of the Land Disputes Tribunal established under ***Section 4 of the repealed Land Disputes Tribunal Act.*** That ground of appeal must therefore also fail.

In the circumstances therefore, this appeal lacks merits. It is hereby dismissed. The Respondents shall have costs both of the appeal and the suit in the subordinate Court.

B. N. OLAO

JUDGE

16TH JUNE, 2017

Judgment delivered, dated and signed in open Court this 16th day of June 2017

Ms Kiragu for Appellant present

Ms Njiru for Ms Thungu for the Respondents present.

B. N. OLAO

JUDGE

16TH JUNE, 2017