



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. APPEAL CASE NO. 14 OF 2016

(FORMERLY HCCA NO. 21 OF 2015)

STEPHEN KARIUKI NJERU.....APPELLANT

VERSUS

JOEL MUNYI NYAGA.RESPONDENT

(Being an appeal from the judgement of Hon M.O. Obiero (SRM) delivered on 22nd April 2015 in the Principal Magistrate's Court at Runyenjes in Civil Suit No. 32 of 2013)

JUDGEMENT

1. This appeal arises from the judgement and decree of the Hon. M.O. Obiero (PM) in Runyenjes RMCC No. 32 of 2013 by which he dismissed the Appellant's suit against the Respondent.
2. The brief background is that the Appellant herein was the Plaintiff in Runyenjes RMCC No. 32 of 2013 and had sued the Respondent who was the Defendant for an order of eviction from *Title No. Kagaari/Kanja/8702* (hereinafter called the 'suit property') and an order for removal of a restriction the Respondent had placed against the suit property. The basis of the suit was that the Appellant was the registered proprietor of the suit property whereas the Respondent was said to be in unlawful occupation thereof.
3. The Respondent filed a defence to the said suit and denied the Appellant's claim in its entirety. He further pleaded, on a without prejudice basis, that the Appellant was registered as proprietor of the suit property fraudulently. The Respondent also pleaded that he was born and raised thereon and that he had been occupation thereof for 25 years.
4. The Respondent further stated that the suit property was his inheritance from his mother who had in turn inherited it from his father in law. It was also pleaded that the Appellant had colluded with the administrator of the estate of his mother's father in law in order to fraudulently acquire the suit property.
5. The Appellant through a reply to amended defence joined issue upon the Respondent's defence.
6. The parties did not file an agreed statement of issues but the Appellant's advocates filed their version of issues. The Respondent's advocates did not file his version of issues despite being accorded an opportunity by the trial court to do so. At some point in the proceedings, they indicated that they would just rely upon the issues as drawn by the Appellant's advocates.
7. The suit was heard on merit before the Hon Principal Magistrate M.O. Obiero who delivered

judgement on 22nd April 2015 dismissing the Appellant's suit with costs. The trial magistrate was not satisfied that the Appellant had proved his case against the Respondent to the required standard.

8. Being aggrieved by the said judgement and decree, the Appellant filed an appeal against it. In his memorandum of appeal dated 15th May 2015, the Appellant raised 8 grounds of appeal, that is;

i. The learned trial magistrate erred in law and in fact in reaching a judgement which was not supported by the evidence on record and failing (sic) to consider the evidence adduced by the Appellant.

ii. The learned trial magistrate erred in law and in fact in finding that the transfer of land parcel No. Kagaari/Kanja/8702 to the Appellant was irregular and illegal whereas there was no evidence to that effect.

iii. The learned trial magistrate erred in law and in fact in finding that there was fraud whereas there was no evidence produced to support fraud.

iv. The learned trial magistrate erred in law and in fact in relying on a forged agreement produced by the Respondent whereas the Appellant's agreement produced as exhibit 2A was admitted by consent.

v. The learned trial magistrate erred in law and in fact in reaching a judgement outside the agreed contested issues by the parties.

vi. The learned trial magistrate erred in law and in fact in finding that the respondent was justified in placing a restriction against the Appellant's land parcel No. Kagaari/Kanja/8702 whereas the Respondent's claim lay with DW 1 and not with the Appellant.

vii. The learned trial magistrate erred in law and in fact in finding that the Appellant had not proved his case to the standards required and that he was not entitled to costs of the suit.

viii. The learned trial magistrate erred in law and in fact by dismissing the Appellant's suit with costs to the respondent whereas indeed the Appellant had proved his case based on agreed contested issues on a balance of probability.

9. It would appear that the parties herein agreed to canvas the appeal through written submissions. The Appellant filed his written submissions on 8th April 2016 whereas the Respondent filed his on or about 13th September 2016.

10. In his written submissions, the Appellant argued grounds 1, 4, 6, 7 and 8 of the appeal together whereas grounds 2 and 3 were argued together. The categorization is somehow confusing. Some of the grounds lumped together are quite distinct from the rest. The court shall therefore consider and determine the various grounds separately and only combine those grounds which are clearly similar in nature or effect.

11. In my view, the 1st, 7th and 8th grounds relate to the overall evaluation of the evidence by the trial court in reaching the decision to dismiss the Appellant's suit. These grounds shall therefore be considered last in this judgement. The court shall otherwise deal with the rest of the grounds of appeal in the order in which they are listed in the memorandum of appeal except where two or more grounds are similar.

12. The court is aware of its duty as a first appellate court. It was held in the case of **Selle Vs Associated Motor Boat Co. [1968] EA 123 at 126** that a first appellate 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...”

13. The 2nd ground states that the trial court erred in holding that the transfer of the suit property to the Appellant was irregular and illegal whereas there was no evidence on record to that effect. The 3rd ground is similar to the 2nd one in that it faults the trial court for holding that the said transfer was fraudulent whereas there was no evidence of fraud. The court has considered the pleadings and the evidence on record. It is evident that the Respondent pleaded fraud in paragraphs 6 and 8 of the amended plaint. The evidence on record also indicates that the Appellant may have short circuited the process of transfer by obtaining the transfer directly from the administrator of the father in-law of the Respondent's mother.

14. The Land Registrar of the relevant registration district testified that the transfer of the suit property was done by one Timotheo Naftary as transferor. There was no mention of his capacity as administrator or that he undertook the transfer on behalf of the Respondent's mother who was entitled to be registered as proprietor of the suit property. In fact, there was no mention or record of the succession proceedings at all on the basis of which the said administrator could have transferred the suit property. In my opinion, the trial magistrate had some reasonable evidence before him upon which he could have reached the findings that he did.

15. The court is, however, of the view that the question of fraud or illegality in the acquisition of the suit property by the Appellant could only be legitimately litigated in a suit between the Appellant and the Respondent's mother. It was the Respondent's mother who was entitled to a share of the property of her father in-law in *Embu High Court Succession Cause No. 17 of 2005*, and not the Respondent. In the event, the only person who could legitimately complain of having been defrauded was the Respondent's mother Anna Gicuku Samuel and not the Respondent. It is in this respect that the trial magistrate erred. The court shall determine the effect of such an err towards the conclusion of the judgement.

16. The Appellant's 4th ground faults the trial magistrate for relying on a forged sale agreement produced by the Respondent whereas the Appellant's copy of the sale agreement had been produced by consent. According to the record, there were two versions of the sale agreement which were produced. They were similar in every respect except for some variation in clause 3 on when and by whom vacant possession was to be given. In my view, the mere fact that an exhibit has been produced without objection from the adverse party does not make it genuine or authentic. Conversely, if its production is objected to, that does not *ipso facto* transform the document into a forgery. In a situation where 2 copies of sale agreement are produced in civil proceedings, it is the party alleging that one of them is a forgery to prove that allegation.

17. The court has perused the evidence on record and there is no credible evidence on record by the Appellant to demonstrate that the copy of the sale agreement produced by the Respondent was a forgery. The sale agreement was drawn by M/S Eddie Njiru & Co Advocates which is a law firm based in Embu but the advocate concerned was not called as a witness. In those circumstances, the trial magistrate could not be faulted for relying upon an exhibit which is alleged, but not proven, to be a forgery. The court therefore finds no merit in this ground of appeal and the same is rejected.

18. The 5th ground of appeal faults the trial magistrate for reaching a judgement outside the agreed issues for determination. The Appellant submitted that the parties were bound by their pleadings and relied upon *NBI Civil Appeal No. 91 of 2012, George Omondi Vs Guilders International Bank Ltd [2015] eKLR* and *Kisumu Civil Appeal No. 168 of 2011 Dakianga Distributors (K) Ltd Vs Kenya Seed Co Ltd [2015] eKLR*. Those two cases are authorities for the proposition that a court should not base its decision on a ground which was not pleaded by the parties. It was submitted that issues of fraud and illegality were either not raised in the pleadings or among the agreed contested issues in the suit hence the trial magistrate erred in considering and basing his judgement on them.

19. The court has perused the pleadings and proceedings before the trial court. It is evident that the Respondent pleaded in his amended defence that the Appellant had fraudulently obtained registration of

the suit property by colluding with the administrator of the estate of his mother's father in-law. The amended defence was not elegantly drawn. The particulars of fraud were not enumerated in the amended defence although some particulars were contained in the body of paragraph 8 thereof. As it turned out during the trial, not all particulars of fraud had actually been pleaded. For instance, the fact that the administrator had transferred the suit property to the Appellant as a "gift" was not particularized in the amended defence.

20. As pointed out earlier in the judgement, the parties never filed an agreed statement of issues for determination at the trial. Whereas the Appellant filed his version of contested and uncontested issues, the Respondent's advocates did not file any. Despite getting an extension of time to file, they were unable to do so. At the trial of the suit, the Respondent's advocates indicated that they would just go by the issues as filed by the Appellant's advocates.

21. The Appellant's list of contested issues were dated 22nd July 2013 and filed on 24th July 2013. The 1st issue was whether the Appellant as registered owner was entitled to vacant possession of the suit property. The 2nd was whether the Respondent was unlawfully occupying the suit property. The 3rd was whether the Appellant was entitled to the reliefs sought against the Respondent, and the final issue was whether the Appellant was entitled to costs.

22. The record also shows that subsequent to the filing of the statement of contested issues by the Appellant, both parties amended their pleadings and introduced additional issues e.g fraud in the Appellant's acquisition of the suit property and the placement of a restriction on the suit property at the instance of the Respondent. However, the parties do not appear to have revised or filed an amended statement of contested issues for determination.

23. The court has perused the judgement dated and delivered on 22nd April 2015 by the trial magistrate. The learned magistrate framed 8 issues for determination. The additional four issues were;

- a. Whether there was a sale agreement between the Plaintiff and the Defendant's mother.*
- b. If there was such an agreement what happened to the same.*
- c. Whether the transfer of the suit land to the Plaintiff was fraudulent and illegal.*
- d. Whether the Defendant was justified in placing the caution on the suit land.*

24. So, where did the additional issues emanate from? It is evident that the two issues relating to the existence and the fate of the sale agreement emanated from the Respondent's submissions. That is clearly not a legitimate source of issues for determination. The general rule is that issues for determination in a suit can only emanate from the pleadings of the parties. There are a few recognized exceptions to this rule. The trial magistrate, therefore, erred in introducing those two issues when they were not pleaded by either of the parties.

25. What about the other two issues on fraud and placement of a restriction on the suit property? This court is of the opinion that those issues flowed directly from the *amended* pleadings of the parties. The issue of fraudulent transfer of the suit property was raised by the Respondent in his amended defence while the legality of the restriction was raised by the Appellant in his amended plaint. In my opinion, the trial magistrate did not err in law in considering these 2 issues because they arose from the amended pleadings of the parties. The trial magistrate was not bound to determine only the 4 issues which were framed by the Appellant in July 2013 long before the parties emended their pleadings. The trial court was duty bound to consider the amended pleadings and the issues raised therein.

26. The court therefore finds that the trial magistrate erred in part in framing the two issues relating to the sale agreement but did not err in considering the issue of fraud and the legality of the restriction placed on the suit property. As will be shown later in this judgement, the trial court's findings on the sale

agreement are of no legal consequences in the circumstances of this appeal.

27. The Appellant in his submissions faulted the trial magistrate for considering the issue of fraud when there was no counterclaim by the Respondent. I am not aware of any rule of law which states that a Defendant who has no counterclaim cannot plead as a defence to an action. In my opinion, a Defendant can choose to defend a suit by pleading fraud without raising any counterclaim. The record also shows that no relief was granted to the Defendant in the judgement. The trial court simply dismissed the Appellant's suit with costs.

28. The 6th ground of appeal faults the trial court for holding that the Respondent was justified in placing a restriction on the suit property. It was submitted that the Respondent's claim for inheritance could only lie against his mother and not the Appellant. It must be remembered that what was placed against the title of the suit property was a *restriction* and not a *caution*. A restriction is usually placed by the Land Registrar whenever he is satisfied that a particular parcel of land is in dispute and it usually lasts until resolution thereof. So, the restriction herein was not placed by the Respondent. He had no capacity and means of doing so as a civilian. He simply raised his complaint with the Land registrar who entered the restriction in accordance with the provisions of section 76 the Land Registration Act 2012.

29. In those circumstances, the court is of the view that the Appellant was mistaken as to the nature of the encumbrance and may have erroneously believed that it was placed by the Respondent. That was an official act of the Land Registrar and the same could be removed at the discretion of the Registrar upon due notice to the parties. The court is of the view that this issue was wrongly framed. That notwithstanding, the record shows that the Respondent had been in occupation of the suit property for a long time. He was in possession even before the Appellant entered into a sale agreement with his mother in 2012. By bringing his complaint to the attention of the Land Registrar, he did not act unreasonably. The trial magistrate could not therefore be faulted for reaching the conclusion that he did on that issue. This ground of appeal accordingly fails.

30. The court shall finally consider the 1st, 7th and 8th grounds of appeal. These grounds relate to the evaluation of the totality of the evidence on record and whether or not the Appellant had proved his case to the required standard. The Appellant contended that the trial magistrate erred in dismissing his suit whereas he had proved his case on a balance of probability as required by law.

31. The court has considered the entire evidence on record and the amended pleadings of the parties. It is not in dispute that the Appellant is the registered proprietor of the suit property. It is also not in dispute that it is the Respondent's mother who was legally entitled to inherit the suit property from the estate of her father-in-law. That is confirmed by the certificate of confirmation of grant. Equally clear is the fact that the Respondent was not entitled directly to a share of the suit property from the estate of the father-in-law of his mother. In my opinion, the Respondent had no plausible defence against the Appellant's claim. The pleaded defence of fraud can only be legitimately raised by his mother who was the person entitled to be registered as proprietor as a beneficiary of the estate of his father-in-law. It would appear from the judgement that the Respondent's mother had filed such a case against the Appellant and the same was still pending at the time the suit before the magistrate's court was heard.

32. The court is, therefore, inclined to allow the appeal and to set aside the judgement of the learned trial magistrate for the reasons given in the immediately preceding paragraph. The appeal succeeds on the basis of the 1st, 7th and 8th grounds of appeal only. Although the placement of the restriction on the suit property by the Land Registrar was not unlawful, it is now imperative that the same should be removed following resolution of this dispute through this judgment.

33. The upshot of the foregoing is that the Appellant's appeal is hereby allowed. Consequently, the judgement of the trial magistrate dated 22nd April, 2015 is hereby set aside and in its place, judgement is entered for the Appellant in the following terms;

- a. An eviction order is hereby issued for the eviction of the Respondent from parcel No. KAGAARI/KANJA/8702.

b. An order for removal of the restriction on parcel No. KAGAARI/KANJAI/8702 is hereby granted.

c. The Respondent shall bear the costs of the suit and costs of the appeal.

34. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **23rd** day of **NOVEMBER, 2017**

In the presence of Mr Andande holding brief for Ms Fatuma for the Appellant and the Respondent in person.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

23.11.17