



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO 11 OF 2017

NAOMI WANGECHI MUNENE.....APPELLANT

VERSUS

VERONICA WANJIRU.....RESPONDENT

Being an appeal against the Judgment of the Principle Magistrate court at Nyahururu (D.K MIKOYAN Ag SPM delivered on 20th March 2013

in

SPMCC No. 336 of 2009

JUDGEMENT

1. What is before me for determination on Appeal is a matter which was heard and decided by D.K MIKOYAN Ag SPM in the Principle Magistrate Court at Nyahururu in Civil Case No. 336 of 2009 where the learned trial Magistrate, upon taking the evidence of both parties, delivered his judgment on the 20th March 2013 dismissing the suit for reasons that he would be overstepping his mandate by determining if indeed the defendant/Respondent herein had a right over the plaintiff. He also gave reasons that since the suit before him was one for vacant possession, which he could not issue since there were other issues that needed to be addressed a higher jurisdiction.
2. The Plaintiff/Appellant being dissatisfied with the judgment of the trial magistrate has filed the present Appeal before this court.
3. The grounds which the Appellant has raised in her Memorandum of Appeal include:
 - i. That the Learned Magistrate failed to identify the legal owner of the suit property namely Nyahururu Municipality Block 8/790
 - ii. That the Learned Magistrate erred in law and in fact by failing to appreciate that the burden of proof lay squarely on the defendant.
 - iii. That the learned Magistrate misdirected himself in finding that there was no clear evidence to establish that the defendant was occupying the said suit land illegally.
 - iv. That the learned Magistrate misdirected himself on the issue of vacant possession and deemed it fit that the said property be occupied by the Defendant.
4. This being an appeal in the High court in the first instance as the first appellate court, the same shall lie herein on a question of law or fact.
5. Looking at the proceedings in the trial court, it is clear the Appellant herein instituted suit against the Respondent vide a plaint dated the 23rd November 2009 and filed on the same date.
6. In the said plaint, the Appellant had averred that she had become the registered proprietor of parcel of land No. Nyahururu Municipality Block 8/790 on the 14th February 2008 wherein a lease hold title had been issued in her name.
7. That despite being the proprietor of the suit land, the Respondent has refused to, failed and/or neglected to vacate the suit land despite a notice having been served upon her.
8. The plaintiff thus had sought for the following orders:

i. That the defendant, her agents, servants, employees and/or anyone claiming under her vacate the suit premises and in the alternative, an eviction and injunctive order to issue against the defendant her agents, servants, employees and or anybody claiming under her.

ii. Costs of this suit be borne by the Defendant.

iii. Any other relief as the court may deem just to grant.

9. With the consent of both parties, this Appeal was heard by way of written submissions. The Appellant filed her submissions on 16th March 2015 while the Respondent filed hers on the 30th November 2015. I have read them and summarize them as follows.

10. The Appellant submitted that the trial court erred by finding that the Respondent had acquired interest in the suit land thus entitling her to the property by way of an overriding interest as provided for under the Land Registration Act, despite lack of sufficient evidence tabled. The Appellant also faulted the trial court to the effect that although evidence tendered in court proved that the Respondent herein was merely working for the Appellant's deceased father while residing at the suit premises, the court found that she (Respondent) was married to the deceased, despite there being no evidence laid before court proving such allegations.

11. The Appellant was thus aggrieved that the trial court did not find it fit to declare that the Respondent herein was illegally on the suit land, judging from her previous conduct, to direct that she be evicted from the same.

12. The Respondent's submissions on the other hand was to the effect that, the Appellant herein had fraudulently obtained title to the suit land when she filed Succession Cause No. Nairobi High Court Succession Cause No.2069 of 2005 without involving the and by not disclosing that the Respondent had a beneficial interest in the suit land.

13. The court was reminded of its duty as a first appellate court when attention was drawn to the case of **Selle vs. Associated Motor Boat Company Ltd, (1968) EA 123** where the court is enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and come to its own independent conclusion.

14. The respondent's further submission was that the trial court was in order when it found that although the Appellant was Registered as the absolute owner of the suit land yet vide provisions of sections to 30(g) of the repealed **Registered Land Act** as read with section 107(1) of the Land Registration Act 2012, the Respondent had an overriding interest over the suit land and therefore could not be enjoined on the use of the suit land nor evicted from thereon. The respondent relied on the cases of **Gituanja vs Gituanja 1KLR (E & L) 97 and Civil Appeal No, 42 of 1978 Allan Kiama vs. Ndia Muthunya & 9 others** to buttress this point.

15. The Respondent's submission was that she had adduced sufficient evidence in the trial court proving that indeed she had been married to the deceased proprietor of the suit land. The burden was therefore upon the Appellant, by operation of section 108 of the Evidence Act to prove that there existed no such marriage under the Kikuyu customary marriage.

16. That since there was no evidence that the Respondent was in occupation of the suit land illegally the trial magistrate cannot be faulted in his findings that the Respondent was legally on the suit land and that she had an overriding interest on the land. The Respondent prayed for the suit to be dismissed.

17. I find that the subject matter and cause of action in this matter was a dispute involving ownership of and title to land parcel No Nyahururu Municipality Block 8/790. The Appellant was dissatisfied with the judgment delivered on the 20th March 2013 in the Principle Magistrate Court at Nyahururu in Civil Case No. 336 of 2009 prompting her to file this appeal.

Matters or determination are therefore as follows;

i. Whether the Respondent was married under the Kikuyu customary marriage

ii. Whether the Appellant is the registered proprietor of the suit land

iii. Whether the Respondent defendant, her agents, servants, employees and/or anyone claiming under her should be evicted from the suit premises.

18. This being a first appeal, I am enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and come to my own independent conclusion. (See **Ephantus Mwangi and Another vs. Duncan Mwangi Wambugu [1982-88] 1 KAR 278** and **Selle vs. Associated Motor Boat Company Ltd, (1968) EA 123**). The ordinary caution that I should equally bear in mind and make allowance for is the fact that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanor, which is diminished in this Appeal because the hearing took place before a Magistrate.

19. I shall endeavor to analyze and evaluate the case herein afresh. Briefly, the evidence adduced at the trial court was that after the death of her father, the Appellant/Plaintiff she obtained letters of administration through Succession Cause No 2069 of 2005 wherein she was issued a grant that was confirmed on the 25th July 2006 making her a beneficiary of the suit land. She subsequently applied for a title which was issued on the 14th February 2008.

20. Further evidence on record is that the Respondent herein had been employed by her deceased father to help in the scrap metal business and that upon his demise on 24th August 2003, the family agreed that she stays on the suit land to help in the disposal of the stock. That when

it was time for her to move out of the suit land, she refused to do so.

21. The defendant later claimed to be the wife of the deceased and even filed objection proceedings on the 16th September 2010 in the succession matter of the late Moses Mwangi Mugo alias Mwangi Ndugo Mbuthia (father to the Appellant), seeking Revocation or annulment of grant issued to the Appellant, which objection was dismissed on 13th December 2011.

22. Evidence was adduced that even after the Respondent had laid claim of being the deceased's wife and the matter was reported to the area chief, she did not produce any evidence proving her allegations.

23. Further evidence was the fact the deceased and his wife one Zipporah Wangari used to live on the suit land that after the death of Zipporah in 1998, the Respondent appeared on the suit land in the year 2001 to assist in the metal scrap business wherein she used to reside elsewhere but would report at the suit land for work until after some time when she was given a room to reside thereon.

24. The Appellant had testified that there had been no marriage between the Defendant and her father the deceased, and further that she had not been listed as the deceased's beneficiary in the Succession Cause.

25. This evidence was supported by the evidence of the Appellant's brother one Charles Ndirangu Mwangi who testified as Pw 2 and Pw3 George Gichea Kinoti who was the deceased's neighbor and who testified that the Respondent was not a wife to the deceased but his employee. He too confirmed that the Appellant was the registered owner of the suit land.

26. In her defence, the Respondent testified that the deceased, whom she referred to as Joseph Kinuthia Mwangi, the Appellant's father, had married her (Respondent) in the year 1988 through Kikuyu customary law which was witnessed by her brother and that dowry had been paid in 2001. She testified that the deceased paid dowry of a ram and ewe sometime in 1998, in a ceremony that was witnessed by her brother.

27. She produced documents to prove that there had been a dowry namely a transaction and agreement (which are not on the file), as well as a chief's letter acknowledging that she was a wife to the deceased. She also produced a copy of her Identity card to prove that she had now taken up the deceased's name 'Mwangi'

28. That after the marriage they lived on the suit land which had been allocated to the deceased. Their marriage was not blessed with any children but took the Appellant and her siblings as her own children. That after that death of the deceased, there developed bad blood between her and the Appellant. She testified that she was not aware of the succession cause that had been filed by the Appellant.

29. The Defendant called three (3) witnesses in her defence who testified that indeed the Defendant and the deceased worked together in the scrap metal business after the death of the appellant's mother. Neither of them testified to having witnessed the traditional wedding between the Respondent and the Deceased nor had they any evidence that the two were married although they testified that the two had lived as husband and wife.

30. The first issue for determination is whether the Respondent herein was married under the Kikuyu customary marriage.

31. Having carefully considered the evidence I find that the evidence adduced by the Respondent herein in proof of her alleged marriage to the deceased fell short of proving the alleged marriage. From the evidence adduced by her three defence witnesses none of them was a witness to the customary formalities apart from a brother whom she had mentioned in passing but who was not called as a witness to testify.

32. There was no evidence that there was any Ngurario ram slaughtered nor was there any evidence that there were any elders from the deceased's relatives who participated in the alleged formalities.

33. I also note from the Defence Exhibit No. 6 dated the 2nd March 2009, that the Respondent had been asked by the chief to avail at least two elders who had witnessed the payment of the dowry but she had failed to do so.

34. **On this issue I am guided by the finding of the court of Appeal in Sakina Sote Kaitany & another v Mary Wamaita [1995]eKLR** wherein the Court stated that **"the onus of proof to establish a particular customary law rests on the party who relies on that law in support of his case"**. The Respondent set out to prove that she was married under Kikuyu customary law and that by virtue of that marriage she was entitled to be recognized as a widow and thus had a beneficial interest in the deceased's suit property. To succeed, thereof she was obliged to satisfy the court on a balance of probabilities her claim.

35. I find that the Respondent did not adduce any credible evidence of the alleged marriage between her and the deceased. Her rather sketchy evidence was that she was married to the deceased whom she referred to as Joseph Kinuthia Mwangi, the Appellant's father, in the year 1988 through Kikuyu customary law which was witnessed by her brother wherein the deceased had paid dowry of a ram and ewe.

36. The essentials of a valid Kikuyu customary marriage are now well settled. In his pioneering work, **Restatement of African Law: Kenya Volume 1 The Law on Marriage and Divorce, Sweet & Maxwell, 1968**, Dr Eugene Cotran states that there can be no valid marriage under Kikuyu law unless a part of ruracio (dowry) has been paid and more categorically, that "No marriage is valid under Kikuyu law unless the Ngurario ram is slaughtered".

37. The elaborate procedures entailed in the Ngurario ceremony are described in detail in **Jomo Kenyatta's Facing Mount Kenya, Heinemann Books, 1988, Chapter VII**. Those procedures were also considered by **Madan, J, as he then was, in Zipporah Wairimu vs Paul Muchemi, HCCC No 1280 of 1970**, where he concluded that "No Kikuyu marriage is finally valid unless Ngurario is performed." The learned Judge observed that Ngurario is performed to show that the boy and the girl have been united and that Ngurario gives the marriage "the final sanction of validity".

38. The importance of Ngurario to a valid customary Kikuyu marriage has been emphasized in other judicial decisions including **Case VS Ruguru (1970) EA 55**, and the decision of the court of Appeal in **Eliud Maina Mwangi vs. Margaret Wanjiru Gachangi, CA No 281(A) of 2003**.

39. The Respondent herein did not adduce any evidence regarding the performance of this critical ceremony to a valid Kikuyu customary marriage. In **Priscilla Waruguru Gathigo vs. Virginia Kanugu Kathigo**, [2004] eKLR which involved a protest by a lady alleging to have been married to the deceased under Kikuyu customary law, **Okwengu, J.** (as she then was), rejected the claim on the following basis:

“Having carefully considered the evidence I find that the evidence adduced by the Protester in proof of her alleged marriage to the deceased fell short of proving the alleged marriage. Apart from her daughter and 2 brothers there were no other independent witnesses to the customary formalities. There was no evidence that there was any Ngurario ram slaughtered nor was there any evidence that there were any elders from the deceased’s relatives who participated in the alleged formalities.”

40. It was for the Respondent to prove that she was married to the deceased under kikuyu customary law and is therefore a wife under section 3(5) of the law of Succession Act. This the Respondent failed to do. On the evidence before the trial court, I find that the Respondent was not married to the deceased and therefore has no beneficial interest in the estate of the deceased more specifically the suit land herein.

41. Having so found the second issue is whether the **Appellant is the registered proprietor of the suit land**. The law which applies to the deceased’s estate in this instance is not Kikuyu customary law, but the Law of Succession Act. The said Act came into force on 1st July 1981. Section 2(1) of the Law of Succession Act expressly ousts the application of Kikuyu customary law to the estate of a Kikuyu dying after the 1st day of July 1981. The whole of section 2 of the Law of Succession Act is relevant to the matters the subject of these proceedings. For avoidance of doubt the said proviso is as follows:

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death ’

42. The effect of this proviso is that the property of a deceased person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling.

43. In this respect thereof it has not been disputed that the Appellant herein was the daughter of the deceased and that upon the demise her father, herein referred to as the deceased, she lodged succession proceedings, being Nairobi High Court being Succession Cause No. 2069 of 2005, with the Appellant herein being the administrator.

44. The grant of letters of administration was confirmed, with the properties of the deceased, one of them being Nyahururu Municipality Block 8/790 the suit parcel herein, being distributed to the beneficiaries of the estate of the late Mr. Moses Mwangi Mugo alias Mwangi Ndugo Mbuthia. Among the beneficiaries is the Appellant herein who was allocated the suit properties. That is how the Appellant herein, obtained title to the suit property and became registered as proprietor on 14th February 2008.

45. The registration of the Appellant as proprietor under the repealed **Registered Land Act, cap 300** constituted her an absolute proprietor and conferred on her all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided in the Act (**section 28**).

46. In the case of **Esiroyo –vs. - Esiroyo [1973] EA 388** the judge reiterated the absolutism of registration and stated that even though the defendants had customary rights over the land the same were extinguished by registration of the plaintiff as proprietor.

47. Having so found, the Appeal herein succeeds in its entirety. It is therefore ordered that;

- i. That the Defendant, her agents, servants, employees and/or anyone claiming under her vacate the suit premises immediately.
- ii. Costs of this suit be borne by the Defendant.

Dated and delivered at Nyahururu this 15th day of November 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE