



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HCA NO. 206 OF 2005

PETER NJUGUNA NJONGEAPPELLANT

VERSUS

JULIUS NARANKAIK OLOGOLIMOT...1ST RESPONDENT

JOSEPH OLOGOLIMOT2ND RESPONDENT

JUDGMENT ON APPEAL

(Being an appeal against the decision of Honourable S.M. Githinji, Senior Resident Magistrate, delivered on 9 December 2005 in Narok SRMCC No. 28 of 2003 Julius Narankaik Olongolimot & Another vs Peter Njuguna Njonge)

(Suit against appellant for a permanent injunction from certain land; when filed, the 2nd respondent/plaintiff was proprietor of the land and 1st respondent held his power of attorney; defendant filing counterclaim for title to the same land on basis that he purchased it from 2nd respondent/plaintiff; while case was pending, 2nd respondent/plaintiff transferring the land to 1st respondent/plaintiff; pleadings however remaining unamended and claimant still being 2nd plaintiff; judgment entered for 1st plaintiff; this erroneous as the 1st plaintiff had no pleadings of his own claiming the land in issue as against the defendant; magistrate holding that he had no jurisdiction to hear appellant's case; magistrate could not have had jurisdiction for the plaintiff and not for the defendant on the same subject matter; appeal allowed with costs)

1. This is an appeal from the judgment of the Senior Principal Magistrate sitting in Narok in Narok SPMCC No. 28 of 2003. This being the first appellate court, I have the duty to reassess the pleadings and re-evaluate the evidence so as to determine whether the learned trial magistrate arrived at a correct finding.

2. The original plaint in this case was filed on 17 March 2003 in the Magistrate's Court at Narok. The plaintiff was Julius Narankaik Ologollimot (the 1st respondent herein) and the defendant was Peter Njuguna Njonge (the appellant herein). I will interchangeably use the words plaintiff/defendant and appellant/respondents to describe the parties to this appeal. It was pleaded in the original plaint that the defendant entered into an agreement on 17 July 1981, with the plaintiff's father, one Joseph Ologollimot, vide which the defendant purchased 30 acres of land at Kshs. 90,000/=. It was pleaded that he only paid a sum of Kshs. 24,000/= leaving a balance of Kshs. 66,000/= which remained unpaid. It was pleaded that the defendant has without reasonable cause interfered with the land parcel Cis Mara/Enabelbel/Enenetia/279 (hereinafter the suit land). In the suit, the plaintiff sought orders to have

the defendant permanently restrained from the suit land.

3. The plaint was later amended to include Joseph Ologollimot as second plaintiff. He is the 2nd respondent to this appeal. It was pleaded inter alia that on 3 February 2003, the 2nd plaintiff executed a power of attorney through which he authorized the 1st plaintiff to deal with the suit property. It was further pleaded that the 2nd plaintiff is ready to refund the sum of Kshs 24,000/= paid by the defendant.

4. The appellant as defendant entered appearance and filed defence and counterclaim. He admitted to having entered into an agreement with the 2nd plaintiff for the purchase of 30 acres of the suit land. He pleaded that he paid the full purchase price. He then took possession, but the 2nd plaintiff charged it to a bank, which hampered the transfer to him. In his counterclaim, he sought orders to have the plaintiff execute the necessary documents to transfer 30 acres to him.

5. In his evidence, the 1st plaintiff/respondent testified inter alia that he is the sole registered owner of the suit land. He obtained title on 7 October 2004. He testified that the 2nd plaintiff, who is his father, relocated to America but he holds his power of attorney which was registered on 24 April 2003. He testified that his father had an agreement with the appellant to sell the suit land. He was not present when the agreement was made but he saw a copy of it among his father's documents. He did not produce a copy of the agreement. He however stated that according to the agreement, the defendant was to pay the sum of Kshs. 90,000/= for 30 acres. He stated that he reported the defendant to the chief so that he can move out but the defendant refused to do so. He testified that the defendant was occupying a portion of his land and should be restrained from it. He was willing to refund any amount that he may have paid.

6. In cross-examination, he testified inter alia that in the year 1981 he was about 18 years old. He was born in the land under dispute but later shifted and went to live in Nyahururu with his father. He was shown the agreement said to be between his father and the defendant and he did not refute it. He agreed that the defendant was resident on the land since the year 1981 and that they have never cultivated the portion occupied by him. He agreed that the title deed in his name was issued while the suit was pending. He denied that the change of ownership was so as to defeat the claim of the plaintiff. He also did not refute that his father had applied and sought consent from the Land Control Board to subdivide the suit land into portions of 30 acres, 8 acres, 2.5 acres and 2 acres.

7. The plaintiffs did not call any other witness.

8. On his part, the defendant testified that the land was sold to him by the 2nd plaintiff at a time when the 1st plaintiff was still a young boy. He testified that the whole land was 101 acres and he purchased 30 acres of it. He produced a search to show that the land was in the name of the 2nd plaintiff. He stated that they wrote an agreement on 17 July 1981 in Nyahururu in Kikuyu language. The purchase price was Kshs. 3,000/= per acre thus a total of Kshs. 90,000/=. He gave a cheque of Kshs. 24,000/= and was to pay the balance in installments. The cheque was dated 1 July 1981. He testified that he paid the balance of Kshs. 6,000/= on 25 July 1981. They met in Nyahururu on 10 August 1981 and he paid the 2nd plaintiff the sum of Kshs. 3,000/=. On 28 January 1982, he gave Kshs. 6,000/=. He produced bank pass books to show that he withdrew these sums of money. On 17 January 1983, he paid the sum of Kshs. 9,000/= by giving the 2nd plaintiff cash of Kshs. 4,000/= and paying a debt that he had with one Koikai Ole Kamuiro of Kshs. 5,000/=. On 16 April 1983, he stated that he paid a sum of Kshs. 6,000/= directly to the 2nd plaintiff at his house. He said on calculating, he had paid the sum of Kshs. 54,000/=. They both signed the agreement. He stated that on a later date that he could not remember, he gave the 2nd plaintiff an amount of Kshs. 1,000/= when his mother fell sick and died, thus making the total payments to be Kshs. 55,000/=. On 21 November 1983, he gave the 2nd plaintiff a sum of Kshs. 20,000/= being cash of Kshs. 2,000/= and a cheque of Kshs. 18,000/=. He remained with a balance of Kshs. 15,000/= to pay which he paid on 30 October 1989 through a cheque. The cheques were produced as exhibits. But this cheque was never cashed by the 2nd plaintiff who informed the defendant that he had misplaced it. To make good this sum, the defendant on 4 May 1990, paid the 2nd plaintiff cash of Kshs. 5,000/=. He later sold a cow at Kshs. 8,500/= and added his own Kshs. 1,500/= to make Kshs. 10,000/= which he later paid. The payments were reflected in the agreement which he produced as an exhibit.

9. He testified that on 9 February 1986, the 2nd plaintiff made an application to the Land Control Board for subdivision of the land. He wanted to subdivide it into 4 portions; 30 acres for the defendant, 8 acres for one Evanson Kimani Nganga, 2.5 acres for one Nganga Njoroge, and 2 acres for one Mwangi Kabui. Consent to subdivide was granted. The defendant then paid Kshs. 1,750/= as survey fees on 16 February 1988. The other purchasers also paid survey fees. A mutation form dated 28 March 1998 was then done. When he went to the Lands' Office, he was informed that the title was under a loan and there is nothing that could be done until the loan is paid. The land was therefore not transferred to them. He stated that he however continued with occupation of his portion which is fenced. On 29 August 2003, the 1st plaintiff brought surveyors and there was no issue raised on his portion of land but he thereafter started causing him problems.

10. In cross-examination, he testified inter alia that the 2nd plaintiff could speak in Kikuyu, Swahili and Maasai language. It is him who wrote down the agreement. He testified that the land was charged and that is the reason they did not apply for consent to transfer from the Land Control Board. He trusted that the 2nd plaintiff would repay the loan to the bank.

11. PW - 2 was one John Njoroge Nganga. He described the appellant as his teacher and he also knew the 2nd plaintiff. He testified that he travelled with the appellant to Nyahururu on 21 November 1983 to visit the 2nd plaintiff as he was buying his land. On this day, he testified that the appellant gave out a cheque for Kshs. 18,000/= and cash of Kshs. 2,000/=. He was aware that the appellant settled on the land and he is even the one who sold to him barbed wire to fence the land. In cross-examination, he stated that he was not present in the initial deliberations and while at Nyahururu, the transaction was not put down in writing.

12. He testified that the 2nd respondent sold to him 8 acres of his land. On 11 February 1986, they went to the Land Control Board together with the appellant and two other purchasers, namely Kabui and Gituro. He stated that consent was given. DW-4 and DW-5 were Mwangi Kabui and Nganga Njoroge respectively. They gave evidence that they purchased 2 acres and 2.5 acres respectively from the 2nd respondent.

13. DW - 6 was Stephen Rioba Kabaga, the Assistant Land Registrar of Narok. He affirmed that consent to subdivide the suit land into 4 portions was granted on 11 February 1986. At that time, the land was under charge in favour of Kenya Commercial Bank for a loan of Kshs. 100,000/=. No other transaction could be registered given the charge.

14. There was an application for adjournment to call a surveyor but this was rejected and the defendant closed his case. Counsels filed written submissions and judgment was delivered on 9 December 2005.

15. In his judgment, the learned trial magistrate, found that the appellant and 2nd respondent had an agreement for the sale of 30 acres of the suit land. He never made a concrete finding as to whether or not the full purchase price had been made. He however found that the land is now registered in the name of the 1st respondent and he has a title issued on 7 October 2004 which was obtained while the matter was still in court. He formed the opinion that pursuant to Section 27 of the Registered Land Act, (now repealed but then operational) the registration of the 1st respondent vested in him the suit land. He held that under Section 159 of the Registered Land Act, only the High Court could determine whether the appellant could have acquired title by way of adverse possession or enforce the claimed agreement. He held that the court lacked jurisdiction to make such orders. He found that since the 1st respondent has the title deed, then he is entitled to the prayers sought in the plaint and entered judgment in his favour. The defence and counterclaim were dismissed for want of jurisdiction.

16. In this appeal, the appellant has raised eight grounds of appeal drawn as follows :-

(i) That the learned trial magistrate erred in law and in fact in presiding over and adjudicating upon a matter that was outside his jurisdiction.

(ii) That the learned trial magistrate erred in law and in fact in granting orders that were neither

sought nor prayed for by the respondents.

(iii) That the learned trial magistrate erred in law and in fact in relying solely on the evidence of the 1st respondent which was obviously inconsistent and contradictory.

(iv) That the learned trial magistrate erred in law and in fact in relying solely on the evidence of the 1st respondent despite the fact that the suit was purportedly instituted by two parties.

(v) That the learned trial magistrate erred in law and in fact in allowing himself to be guided by immaterial and irrelevant facts that did not form part of the issues for determination.

(vi) That the learned trial magistrate erred in law and in fact in holding against the appellant despite sufficient grounds and evidence adduced to support a judgment in favour of the appellant.

(vii) That the learned trial magistrate erred in law and in fact in dispossessing the appellant of his land despite the overwhelming evidence adduced by the appellant which was sufficient to support a judgment in favour of the appellant.

(viii) That the learned trial magistrate relied on wrong principles of law and fact in arriving at his decision.

17. In his written submissions, Mr. Karanja Mbugua, learned counsel for the appellant, submitted inter alia that the learned trial magistrate erred in not taking into account the transfer of the land while the case was still pending. He submitted that it was required of him to decide the effect of it. He relied heavily on the decision of Angote J in Malindi ELC No. 55 of 2011, where the judge stated as follows "*where a party to a suit transfers the suit property to a third party while the suit is till pending, such transfer is null and void. The common law principle of lis pendens is a principle of general application whose purpose is to preserve the suit property until the suit is finally heard. The doctrine is founded in public policy and equity.*"

18. On this point, he also relied on the cases of ***Mawji vs U.S International University and Another (1976-1980) KIR 229***; ***Fredrick Joses Kinyua and Another s G.N Baird, Nairobi HCCC No. 6587 of 1981*** and ***Bir Singh vs Parman (1972) EA 211***; ***Malindi ELC Civil Appeal No. 5 of 2009, Kadheka Mutisya Ngata vs Emmanuel Ngade Nyoka & 3 Others; Nairobi Civil Appeal No. 44 of 2014, Naftali Ruthi Kinyua vs Patrick Thuita & City Council of Nairobi***; and Section 52 of the Indian Transfer of Property Act (now repealed).

19. He submitted that the transfer of the land while the case was pending was aimed at subverting the cause of justice. He submitted that the respondents did not defend the counterclaim yet the law enjoined them to file a defence lest the court would take it that it was admitted. On specific performance, he relied on the cases of ***Wambugu vs Njuguna (1983) KLR 172*** and ***Rodgers vs Wood (1948) 1 All ER 38***.

20. He submitted that the Magistrate had jurisdiction since the value of the subject matter was Kshs. 90,000/= thus falling within the pecuniary limits of Section 159 of the Registered Land Act. Counsel submitted that he could not comprehend why the learned magistrate chose to have jurisdiction for the plaintiffs' case but none for the defendant. He submitted that there was a valid sale agreement; that consent of the Land Control Board was sought and obtained; that the appellant had paid the purchase price but that the 2nd respondent stole a march on the appellant by transferring the land to the 1st respondent. He asked that the appellant's counterclaim should be allowed with costs and the respondents' case dismissed.

21. On the other hand Mr. Chomba for the respondents, submitted principally on two points i.e

(a) Whether the learned trial magistrate had jurisdiction to determine the matter.

(b) The doctrine of *lis pendens* as pleaded by the appellant.

22. On jurisdiction, counsel referred to Section 159 of the Registered Land Act and submitted that the trial magistrate was "obviously cognizant" of the value of the property at the time of filing suit which ousted his jurisdiction to determine the issue with regard to title. He submitted that the suit was filed on March 2003 and therefore the appellant is wrong in using the value of the year 1981, 22 years before the matter was filed. He submitted that this automatically ousted the jurisdiction of the court

23. On the issue of *lis pendens*, counsel relied on the following dictum of Cranworth L.J in the case of ***Bellamy vs Sabino (1957) De J, 566*** where it was stated as follows :-

"Where litigation is pending between a plaintiff and defendant as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigating parties but also on those who derive title under them by alienation pending the suit whether such alienees had or had no notice of the proceedings. If that were not so, there would be no certainty that the proceedings would ever end..."

24. He submitted that the trial magistrate was wise not to delve into this issue as that would ultimately have led to determination of title thus acting outside his jurisdiction. He further submitted that the transfer happened between the parties, i.e between the 1st and 2nd respondent, thus no need of applicability of the doctrine because either way they were bound by the decision of the court. He also submitted that the doctrine does not annul title but stretches the court's power to persons not parties to the suit.

25. In his conclusion, counsel submitted that the appellant has now filed another suit for adverse possession four years after filing this appeal in the hope that should the appeal fail, the O.S would hold. He was of the view that this was done in bad faith. He asked that the appeal be dismissed.

26. I have considered the matter and I am of the following view.

27. The suit before the court was by two persons, that is, Julius Ologollimot and Joseph Ologollimot. Julius is the original plaintiff before the plaint was amended. When the case was originally filed on 17 March 2003, the suit property was in the name of Joseph who was then not a party to the case. In my view, at that time, Julius could not have had *locus standi* to institute the suit. The suit property did not belong to him, and neither did he at that time hold any power of attorney from the registered owner, the power of attorney having been registered on 24 April 2003. He had therefore no mandate to act as agent on behalf of the registered owner and he could not file suit on his own behalf as he held no title.

28. The plaint was amended on 18 November 2003 to include the registered owner as a party to the case and he became the 2nd plaintiff. At this time, the property was still registered in the name of the 2nd plaintiff and therefore the claim in the amended plaint can only be considered to have been a claim of the 2nd plaintiff since he was the registered proprietor of the suit land and the person with capacity to sue. In as much as the 1st plaintiff remained in the suit, as I have mentioned, he had no capacity to sue on his own behalf, and he therefore could not have successfully sustained the suit. In fact, his presence in the suit would have been of no meaning had he not been holding a power of attorney on behalf of the 2nd plaintiff. He could only have been pursuing the case on behalf of his father as he himself had no *locus standi*.

29. While the suit was pending, the 1st respondent became the registered proprietor of the suit property on 7 October 2004. A lot has been submitted about the doctrine of *lis pendens*, but I do not see the necessity of addressing it in the circumstances of this case, as will shortly be seen.

30. Once the 1st plaintiff became registered as proprietor of the suit property, the claim by the 2nd plaintiff automatically lapsed, since now, the 2nd plaintiff had no proprietary interest in the suit property and at that point in time, there was really no suit before the court. His cause of action automatically ended when he transferred the title to the 1st plaintiff. But it should be remembered that the case as contained in the amended plaint of 18 November 2003, was the case of the 2nd plaintiff, not the 1st plaintiff. The 1st plaintiff had no pleadings of his own stating that he is the registered proprietor and that he wishes to have the defendant evicted or permanently restrained from the suit land. He held a power of attorney on behalf

of the 2nd plaintiff. He was essentially pursuing the cause of the 2nd plaintiff and not his own personal cause. The pleadings however remained unamended, the import being that the suit proceeded on the basis that it was the 2nd plaintiff who was claimant and not the 1st plaintiff. There was no further amendment to the pleadings to state that the 1st plaintiff has acquired title and is now the asserting the prayers in the plaint on his own personal behalf. The pleadings remained as they were, meaning that they were agitating the case of the 2nd plaintiff, which could now not hold as he had already transferred the suit land to the 1st plaintiff. At this juncture, the pleadings needed to be amended to enable the 1st plaintiff sustain the case as his own case and not that of the 2nd plaintiff.

31. It should be remembered that the defendant had a counterclaim which counterclaim was not directed at the 1st plaintiff but at the 2nd plaintiff. To be fair to him, he had no knowledge of the transfer of the property until the 1st plaintiff ambushed him with a title at the hearing of the suit. But there being no further amendment to the plaint, so as to agitate the case of the 1st plaintiff, the defendant did not have to amend his pleadings, because the pleadings remained as they were, which were still pursuing a case for the 2nd plaintiff, which case could not hold since he no longer had title.

32. It is apparent that the parties and the court did not realize that the case could not proceed on the basis of the pleadings before the court. There was really no case to be tried as between the 2nd plaintiff and the defendant, the 2nd plaintiff having transferred his title, but those were the pleadings upon which the case proceeded for trial. The 1st plaintiff never tendered a case on his own behalf that he should be declared the proprietor of the suit property or that the defendant ought to be permanently restrained from the land. He conducted the case on the basis of the pleadings of the 2nd plaintiff which could not be tenable. A person cannot import the pleadings of another as his own. Such person must file his own suit to be declared claimant. One cannot be plaintiff by riding on pleadings filed by another person.

33. That being the position, it was erroneous for the learned trial magistrate to declare the 1st plaintiff as the rightful proprietor of the suit property for he had no pleadings before him which were asking for such orders. The title of the 1st plaintiff was never the subject of interrogation before the trial court. What was subject for trial, according to the pleadings, was the title of the 2nd plaintiff.

34. For the above reasons, I trust that it will be appreciated why I do not consider the doctrine of lis pendens to be relevant to the circumstances herein.

35. There is also an issue that has disturbed me and that is the issue of jurisdiction. Even assuming that the trial magistrate was correct in holding for the 1st plaintiff, and I have already explained above that it was wrong for him to do so, he could not now contend that he had no jurisdiction on the claim of the defendant. By holding for the 1st plaintiff, he asserted jurisdiction over the matter. But if he had jurisdiction to entertain the case of the plaintiffs, then he certainly had jurisdiction to entertain the case of the defendant for he was dealing with the same land. The only jurisdiction he could not have had was to declare the defendant as owner by dint of the doctrine of adverse possession which under the then Order 36 could only be entertained by the High Court. But the case before the trial magistrate was never one for adverse possession and there is no way he could have held that he had jurisdiction for the plaintiffs' case but no jurisdiction for the defendant's case. I of course am not sure what the value of the subject matter was at the time the suit was filed, the magistrate only being permitted by Section 159 of the Registered Land Act, to have jurisdiction where the value did not exceed Kshs. 500,000/=, since no evidence was led on the value of the subject matter at trial. It is however unnecessary to go into the issue of the pecuniary value of the property, save to emphasize the point that I had earlier made, that there was no way the magistrate could not have had jurisdiction to hear the case of the defendant while he asserted jurisdiction to hear the case of the plaintiffs. That was a clear error on his part.

36. It is clear to me that the learned trial magistrate erred in entering judgment for the 1st respondent when he had no pleadings to assert a case of his own. He also erred in stating that he had no jurisdiction to hear the case of the appellant. The judgment cannot therefore stand and it is hereby set aside. All consequential orders are also set aside.

37. What then should I do with the matter?. If there were pleadings by the 1st respondent, I would

probably have referred back the matter for the magistrate to try the claim of the appellant. But there is no point in doing so. The case in so far as the pleadings show remain those of the 2nd respondent yet he no longer has proprietary interest in the suit property. The counterclaim as it remains is also against the 2nd respondent. There is no purpose in sending back the case for trial on the foundation of these pleadings as there is really no case to be tried on the basis of them. I therefore make the order that the case has been overtaken by events, the key event being the transfer of the suit property to the 1st respondent. The parties are free to file fresh cases as they may so wish to agitate their claims.

38. For the above reasons, I allow this appeal with costs. The appellant shall have the costs of both trial and of this appeal, which costs shall be payable by the 1st respondent, who was the 1st plaintiff in the case before the magistrate's court.

39. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 21st day of September 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Ms. Kipruto holding brief for Mr. Kamau for respondent

No appearance on part of M/s Karanja Mbugua & Co. advocates for appellant

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU