



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NYERI
ELCA NO. 39 OF 2014
(Formerly Nyeri HCCA NO. 23 OF 2013)

JAMES MWANGI NGARI APPELLANT

VERSUS

JAMES MWANGI GIKARU 1ST RESPONDENT

MARY WANGARI MARANGA 2ND RESPONDENT

JUDGMENT

Introduction

1. By a plaint dated 11th November, 2005 the appellant, James Mwangi Ngari, instituted a suit in the lower court to wit, Nyeri CMCC No. 874 of 2015 seeking judgment against the respondents herein for:-

- (a) An order compelling the respondents jointly and severally to vacate plot number 18 Gachatha Market;
- (b) permanent injunction to restrain the respondents from entering plot number 18 Gachatha Market.
- (c) Costs of the suit plus interest.

2. The appellant's case was that he was the owner of plot number 18 Gachara Market (hereinafter referred to as the suit property) together with all the developments therein. The appellant claimed that the respondents who allegedly were illegally occupying the suit property, were preventing him from taking occupation and having peaceful enjoyment of the suit property.

3. In reply and opposition to the suit, the the respondents filed their Statement of Defence dated 27th December, 2005 in which they denied knowledge of the appellant and contended that they are tenants of the owner of the property (read Landlord).

4. Terming the appellant's allegations strange, the respondents contended that they had been paying rent to the owner of the suit property. The respondent further contended that the suit property was subject matter of a suit between their Landlord and Ruth Wamuyu Wachira vide Nyeri CMCCC No. 571 of 2004.

5. In view of the foregoing, the respondents contended that they were wrongfully sued.
6. The case presented before the lower court and which is the subject matter of this appeal was that the appellant bought the suit property together with the developments effected thereon from Ruth Wamuyu Wachira. To prove that fact, the appellant produced the Sale Agreement executed between him and the seller (Ruth Wamuyu Wachira) as **Pexbt 1**.
7. The Appellant told the trial court that after paying for the suit property, he took possession and later appeared before the Nyeri County Council for Transfer. To attest to those facts, he produced a receipt in respect of the money he paid for transfer and search in respect of the suit property as **Pexbt 2** and **3** respectively. He obtained an extract for the suit property, which he produced as **Pexbt 5** and a receipt in respect of the payment he made for the extract as **Pexbt 6**. He also produced a letter from the County Council dated 5th August, 2007 and a bundle of receipts showing he has been paying rent in respect of the property as **Pexbt 7** and **8** respectively.
8. When he realised that the respondents were in occupation of the suit property, he informed the seller who told him that the respondents were strangers.
9. He informed the court that when he sought to know why the respondents were occupying the suit property, the respondents claimed they had bought it.
10. He sent demand letters to the respondents requiring them to vacate the suit property but received no response. He produced the demand letters as **Pexbt 9(a)** and **(b)**.
11. Upon being referred to Nyeri CMCCC No. 571/2004, he admitted that the person who sold the suit property to him had filed a claim in court which she later withdrew. He however, contended that the respondents in the suit which is the subject matter of this appeal were not the defendants in the former suit. He produced the notice of withdrawal of the suit former as **Pexbt 10**.
12. In cross examination, he stated that he does not know how the respondents came into the suit property but admitted that he had written letters to the respondents' earlier on and received a response to the effect that the respondents had leased the suit property from the person who sold it to him, Ruth Wamuyu.
13. He denied having knowledge that Nyeri CMCCC No. 571 of 2004 was dismissed on 1st September, 2006.
14. He admitted that he is the one who wrote the sale agreement and acknowledged that the sale agreement was not signed by the seller. He stated that he was not aware that defendant has leased the plot.
15. He maintained that he was not aware that the respondents had leased the suit property and contended that the respondents took possession of the suit property after he had bought it.
16. Concerning the withdrawal of the former suit, he stated that he did not know why Ruth Wamuyu withdrew it.
17. The Appellants availed witnesses namely Daniel Wahome as (P.W.2) and Murigu Ndegwa as (P.W.3).
18. P.W.2 told the court that the suit property was owned by his father Hudson Wachira who was succeeded by his mother Ruth Wamuyu.
19. P.W.2 told the court that his mother is the one who sold the suit property to the appellant. She did so in 2000. He signed the agreement.

20. He denied having knowledge of the suit which his mother had filed concerning the suit property.
21. On his part, P.W.3 who was an employee of the Nyeri County Council at the material time, told the court that the suit property was originally allocated to Hudson Wachira in 1940's. He, however, stated that he had no minutes capable of proving that fact.
22. He further informed the court that the property was transferred to Ruth Wamuyu Wachira in 2000. In the same year, it was transferred to the appellant. He produced copies of the minutes in support of the transfer as **Pexbt 10**.
23. The Court heard that there was a dispute concerning ownership of the suit property. As a result of that dispute, the suit property was in 2004 minuted for transfer to seven (7) other people including Hudson Wachira. That resolution was however, not given effect because of a pending court case in respect thereof.
24. Although the earlier decision to transfer suit property to the appellant was cancelled by the resolution of 2004, he stated that as things stand now, the property is still registered in favour of appellant.
25. On his part, the 1st respondent (James Mwangi Gikaru) told the court that he has been occupying the suit property as a tenant of Baston Karuga Irato. He told the court that he has been paying rent to Baston Karuga Irato since 2005. To prove that fact, he produced a bunch of receipts as **Dexbt 1**.
26. He admitted that he had no documents to show that the person he pays rent to is the owner of the suit property. The foregoing notwithstanding, he contended that the appellant ought to have sued his landlord, the person he pays rent to.
27. D.W.2 Mary Wangari Maranga, told the court that she has been a tenant in the plot since 1994, as a tenant of Mathew Mundia.
28. Like D.W.1, she pays rent to Baston Karuga Irato on instructions of Mathew Mundia.
29. D.W.2 told the court that she got to know the appellant after he sued them. She produced a business receipt and a bundle of receipts in respect of rent she had paid as **Dexbt-2 and 3** respectively.
30. D.W.2 told the court that her landlord (Baston) had told her that the suit property belongs to 7 people.
31. Her previous Landlord, Mundia, had also told her that the suit property belonged to 7 people but he would be the one collecting rent on behalf of the seven owners.
32. Later on, Mundia handed over collection of rent to Baston.
33. Although she had nothing to show that the property belonged to Mundia, she maintained that her occupation of the suit property was not illegal.
34. Baston Gichuki Harun (D.W.4) told the court that the suit property belongs to his father and six others who bought it in 1946. He mentioned the seven owners some of whom have since passed on.
35. He told the court that he took the place of his father, who was the group Secretary after he passed on in 1984.
36. He informed the court that when all partners were alive there was no dispute.
37. According to D.W.4, Trouble began in 2000 when Ruth Wamuyu (wife of one of the partners-Anderson Wachira) included the suit property as part of her husband's estate.
38. The court heard that when they knew what Ruth had done, they protested to the Council which

suspended the registration effected in her favour in 2004. Consequently, Ruth sued them vide Nyeri CMCCC No. 571 of 2004.

39. He told the court that vide that case, Ruth contended that she was the owner of the property and not the appellant herein. He produced the Plaintiff in that case as **Dexbt 4** and decree obtained in that case as **Dexbt 5**.

40. D.W.4 told the court that he did not know the appellant but admitted having received demand letters from him which he produced as **Dexbt 6(a)** and **(b)**.

41. They responded to the demand vide their letter dated 11th August, 2005, which he produced as **Dexbt-7**.

42. D.W.4 told the court that after they got to know that the suit property was transferred to Ruth and thereafter to the appellant, they complained to the Council which nullified the registration effected in favour of the appellant.

43. According to D.W.4, upon nullification of the appellant's registration, the suit property reverted to the original seven owners. To attest to that fact, he produced Minutes of the County Council to that effect as **Dexbt 8(a)** and **(b)**.

44. D.W.4 told the court that the respondents were his tenants, 1st defendant since 2005 and 2nd defendant since 1994.

45. He denied having knowledge of any succession cause or order in respect of the suit property.

46. Upon considering the respective cases of the parties to this dispute and the submissions made in respect thereof the trial court held:-

“...the County Council of Nyeri resolved the plot be registered in the name of seven people, including the deceased Hudson Wachira. The matter was said to have gone to court and the registration was not affected but the cancellation was not vacated by council.

These facts are not in dispute in this case. The upshot is that ownership of plot No. 18 Gachatha Market is in dispute. The plaintiff claims it. D.W.3 and others claim it and its occupation by 1st and 2nd defendant is hinged on the license by D.W.3 and the five others who lay claim to it.

It is not for this court in this case to determine that issue of ownership. It was not sought here. But the prayers sought herein hinge over ownership, which ownership is disputed. It is trite law that courts can not issue orders on disputed facts before those facts are settled.

The issue of ownership has to be first settled before the plaintiff can seek orders of eviction and injunction prayed herein...”

47. Aggrieved by the aforementioned decision of the trial court, the appellant appeals to this court on the following grounds:-

1. The learned trial Magistrate erred by holding that the ownership of the plot was in dispute yet nobody had challenged his ownership of it in any court of law;
2. The learned trial Magistrate relied on unsubstantiated reports that the appellant's ownership of the plot was cancelled yet current ownership records held by Nyeri County Council indicate him as the owner of the suit property;
3. The learned Magistrate erred by mixing up issues because the respondents' were not claiming

ownership of the suit property but were only claiming to be tenants of people who had not challenged his ownership of the suit property.

4. The learned Magistrate erred by concluding that the dispute preferred before him to determine involved claim of ownership and yet the respondents were not claiming anything.

5. The learned trial Magistrate erred by delving into the issue of ownership.

48. For the foregoing reasons, the appellant prays that the appeal be allowed with costs and an order of eviction of the respondents from the suit property be granted.

49. The appeal was disposed of by way of written submissions

Appellant's submissions

50. The appellants submissions are to the effect that the learned magistrate erred by finding that ownership of the suit property was in dispute yet nobody had challenged the appellant's ownership in court. In this regard, it is argued that the appellant was not seeking to be declared the owner of the suit property because he already was. Besides, it is contended that the respondents did not claim ownership of the suit property.

51. The appellant contends that because the respondents did not claim ownership of the suit property, there was no basis for the learned magistrate to hold that the ownership of the suit property was in dispute.

52. On whether the issue of ownership of the suit property was in issue, on behalf of the respondents, reference is made to their statement of defence and the evidence adduced in support thereof and submitted that the pleadings and the evidence led in court brought into question the issue of ownership of the suit property. In this regard, reference is made to the respondents' averment that they were tenants in the suit property, the evidence they adduced in court in support of that fact, the existence of a court case in which the suit property was the subject matter between the appellant's predecessor in claim and the persons through whom the respondents interest is premised and the various minutes of the County Council of Nyeri produced in court and submitted that the Magistrate was right in holding that ownership of the suit property was in issue.

53. In light of the evidence presented before the court, it is submitted that the court cannot be faulted, because the question of ownership of the suit property is unresolved.

Analysis and determination

54. Whilst it is true that none of the parties raised the issue of ownership, from the pleadings filed before the lower court, I infer that the question is implied. In this regard see paragraph 4 of the plaint where the appellant avers that he is the owner of the suit property. In paragraph 5, the appellant contends that the respondents occupation of the suit property is illegal. Those averments are challenged by the respondents in their statement of defence. In that regard see paragraph 3 of the respondents' reply, where the respondents have termed the appellant a stranger to them and averred that they are on the suit property as tenants of another person.

55. By pointing out the existence of Nyeri CMCCC No.571 of 2004 concerning the suit property, the respondents by implication made it clear that the issue of ownership of the suit property was in question. From the evidence led in court, that averment turned out to be factually correct.

56. The trial court was, in the circumstances, justified in determining that the ownership of the suit property was in dispute. Evidence was led before him which confirmed as much. The parties argued and led evidence concerning ownership of the suit property. In the circumstances, it would be expected that the court would make a determination on the issue. If anything, success or failure of the appellant's

case turned on the question as to whether he was the *bona fide* owner of the suit property and if so, whether the respondents occupation of the suit property was unlawful.

57. Upon review of the evidence adduced in the lower court, I find that the respondents led evidence that showed that they have sufficient interest in the suit property not as tenants of the appellants but as tenants of third parties whose interest the appellant knew of but chose not to sue for the court to be able to determine all the issues in issue in the suit.

58. It is trite law that the court can pronounce itself on an unpleaded issue if the issue has been canvassed before the court and left to it to make a determination. In this regard see the case of **James Njuguna Wainaina & Another v East African Building Society (2014) e KLR**

“My own view, arising from those decisions is that, when issues have been framed by the parties, the Court is bound to determine them unless they are of such a nature that they are irreconcilable with the case at hand or would lead to absurdity. In this case the parties framed the issues for determination by the Court, and the issue of Notice to the borrower [read Plaintiffs] became one of the issues for determination by the Court when the parties by consent asked the Court to interpret the provisions of the Charge with specific emphasis on the question of payment of interest. I do not, therefore, accede to the argument by the Defendant that the issue of notice was not pleaded and should not be entertained by the Court.”

59. Also see the case of **Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR** where it was observed:-

“As such, the allegation that the Respondent’s decision was based on un-pleaded matters is without basis. In any event, where it appears from the course followed at trial that an un-pleaded issue has been left to the Court for determination, the Court or tribunal has to make a finding on it. See Odd Jobs vs. Mubia [1970] EA 476. See also the case of Justus Mongumbu Omiti vs. Walter Osebe & 2 Others Election Petition No. 1 of 2008, where the Court opined that it could not lock out evidence which would help it determine whether a process was free, fair and transparent on the technical grounds that the issues addressed by such evidence were not pleaded.”

60. The upshot of the foregoing is that the appeal has no merit and is dismissed with costs to the respondents.

Dated, signed and delivered at Nyeri this 25th day of October, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Ms Kainga h/b for Mr. Kebuka Wachira for the appellant

N/A for the respondents

Court assistant – Lydia