



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELCA NO. 140 OF 2014

CATHERINE WANGUI MUITA 1ST APPELLANT

MICHAEL M. MACHARIA 2ND APPELLANT

VERSUS

JOHN MURIUKI WATHURE.....1ST RESPONDENT

GEOFFREY WAMBUGU WAHOME.....2ND RESPONDENT

KARATINA MUNICIPAL COUNCIL.....3RD RESPONDENT

JUDGMENT

Background

1. The 1st Appellant **Catherine Wangu Muinga**, alongside her partner, **Michael M. Macharia** (deceased) instituted a suit in the lower court seeking an order for cancellation of what they described as unlawful conversion of Plot No. **T.O.L AK KM 158/8** (hereinafter referred to as “the suit property”) and registration of the suit property in their names.

2. The trial magistrate (hereinafter TM) upon considering the evidence presented before her held that the appellants failed to prove their case on a balance of probabilities and dismissed it with costs to the respondents.

3. Being dissatisfied with the decision of the TM, the appellants filed this appeal challenging the judgment of the lower court on eleven(11) grounds which can be summarised as follows:-

1. That the learned TM erred in law and in fact by considering the evidence of the 1st respondent as true and worthy of any credit when the same was inconsistent;
2. That the learned TM failed to find that by failing to properly instruct his advocate, the Respondent had something to hide from the court;
3. That the learned TM failed to take note of the fact that the 1st Respondent refused or failed to disclose how Kenya Railways allowed them to enter the suit property;
4. That the learned TM erred in law and in fact by taking into consideration the letter dated 24th September,1997 when the same was surrendered to the Kenya Railways by the 1st Respondent after he was unable to pay the rent and rates or construct structures on the suit property so that the same could be transferred to the appellants;
5. That the learned TM erred in law and in fact by failing to find that the 1st Respondent witness,

D.W.2, called him a liar for alleging that the timber for effecting developments on the suit property came from his farm yet it had been obtained from another person, Chief Mugweru;

6. That the learned TM erred in law by failing to take into account the fact that the 2nd Respondent failed to participate in the case thereby arriving at the wrong conclusion/judgment;
7. That the TM erred in law and fact by failing to invite the other parties to the suit (2nd and 3rd Respondent) to defend themselves thereby making his judgment a nullity in law;
8. That the TM erred in law and fact by failing to take into account that the whole problem was brought by the 3rd Respondent by favouring the 1st Respondent;
9. That the learned TM erred in law and in fact by bringing some extraneous matters to support the evidence of the 1st Respondent; and
10. That the learned TM erred in law and in fact by condemning her to pay costs to parties who never participated in the hearing of the case.

4. For the foregoing reasons, the appellant prays that the appeal be allowed; the judgment and/or order of the lower court be set aside and an order of re-trial by another magistrate be made.

5. In considering the appeal, this court must evaluate afresh the evidence on record in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. See **Selle & Another vs. Associated Motor Co. Ltd & Others** (1968) E.A. 123.

6. According to the case presented before the lower court, it was the Appellant's testimony that the 1st Respondent surrendered the suit property to them (her partner and herself). Thereafter they made an application to Kenya Railways, which application the 1st Respondent did not object to. They also went to the 3rd Respondent and obtained a plan to develop the suit property. The lower court heard that the 1st Appellant and her partner developed the suit property and that the 1st Appellant was the one who had been paying rent to Kenya Railways before they began having disputes concerning ownership of the suit property. The court heard that the 1st Appellant started experiencing problems after her partner passed on in 2007.

7. It was the 1st Appellant's case that the 1st Respondent teamed up with her deceased partner's children to deny her an opportunity to collect rent from their tenants. The lower court heard that the 1st Respondent took three rooms out of the seven constructed claiming that he was a co-owner of the suit property.

8. The court further heard that the 1st Appellant and her partner had entered into an agreement with the 1st Respondent to the effect that he would get an equal share of the developments effected on the suit property if he contributed an equal share of the resources used to develop the suit property.

9. Maintaining that the 1st Respondent did not meet his part of the bargain, the 1st Appellant blames the 1st Respondent for illegally holding on to the 3 rooms.

10. The lower court heard that as a result of the misunderstanding concerning the use of the suit property, the 1st Appellant made a report to the area chief and the OCPD.

11. Maintaining that the 1st Respondent is holding the 3 rooms illegally, the Appellant urges the court to allow her take possession of the rooms held by the 1st Respondent to enable her pay rent to Kenya Railways, which is no longer being paid.

12. The 1st Appellant blames the 3rd Respondent for having allowed the 1st Respondent to change the license to the suit property yet it knew she was the one answerable to Kenya Railways.

13. On cross examination, the Appellant admitted that by the time they came to the suit property, the 1st Respondent had effected some developments thereon and that the 1st Respondent did not sell the suit property to them. The Appellant further admitted that the 1st Respondent participated in the development of the suit property but contended that he (1st Respondent) did not contribute the equal share as agreed or expected of him.

14. The court further heard that after completion of the seven rooms, the 1st Appellant and her partner took four rooms and the 1st Respondent three rooms. The 1st Respondent was to pay rent to Kenya Railway but he refused to do so.

15. The 1st Respondent, who testified as D.W.1, informed the court that as early as 1997, he was operating a barber shop at the suit premises. Officers of the Kenya Railway Corporation approached him and advised him to apply for allocation of the suit property so as to be paying rent. Pursuant to the advice given, he applied and got allocated the suit property vide a letter dated 24th September, 1997. He produced a copy of the letter of allotment as Exhibit 1. Because he had no money to develop the suit property, on or about the year 2000, he approached the 1st Appellant who agreed to join him in developing the suit property. The 1st Appellant came with her partner and they agreed to divide the suit property into two portions, portion A and B. A was to be for him and B for the appellant and her partner.

16. The court heard that after they executed the agreement which was witnessed by two witnesses from each side, the 1st Appellant and her partner obtained approval from the 3rd Respondent to effect the intended developments on the suit property. That approval enabled the 1st Appellant and her partner to go to Kenya Railways and transact the plot. The court heard that at that time, a plot could be allocated to 3 - 4 people.

17. Concerning developments on the suit property, the 1st Respondent stated that the Appellants gave him money for the construction and that they obtained a plan from an engineer who worked with the 3rd Respondent, one Kararu.

18. It was the 1st Respondent's case that after they completed seven rooms, they shared them so that the 1st Appellant got three rooms, her partner two rooms and himself two rooms. Since it was the 1st Appellant who got the extra room, it was agreed that she would be paying land rent to Kenya Railways.

19. The trial court heard that after about one year, disputes arose concerning ownership of the suit property. After the dispute was referred to the Provincial Administration for resolution, the area District Officer (D.O) appointed elders to resolve the dispute. The elders initially directed that the 1st respondent gives the appellants Kshs.54,470/= in order to be at par with them in terms of the costs incurred in developing the suit property. However, after explaining that the appellant had been collecting rent in respect of the extra room, the elders resolved that the appellant continues collecting rent from the extra room until she offsets the amount owed by him.

20. Contrary to his explanation that he got two rooms, the 1st Respondent stated that he owns three rooms.

21. Upon being cross-examined by advocate for the appellant, the 1st Respondent admitted that he took the 1st Appellant and her partner to Kenya Railways but explained that what they wanted to do was not done. He stated that the Appellants wrongfully changed title documents in respect of the suit property. He further stated that he had been paying rent in respect of the suit property since 1997.

22. He admitted that he was present when the Municipal council gave approval for construction and that after they constructed the 7 rooms, he got three and his partners 4.

23. Concerning the allegation that the appellants obtained the suit property illegally, he admitted that those allegations are not part of his statement of defence.

24. On her part **D.W.2 Nancy Gathoni Kabuu**, stated that she co-owned the suit property with the 1st Respondent, having obtained it in 1996. D.W.2 informed the court that she is the one who told the 1st Respondent to get other people to assist them in developing the suit property because they had no money to develop it.

25. D.W.2 further informed the court that the 1st Respondent and the Appellants constructed the suit property as partners. According to D.W.2, each side of the partnership was to get 3 rooms with rent from

the extra room being used to pay the Land rent in respect of the plot.

26. D.W.2 denied the allegation that the 1st Respondent surrendered the suit property to the Appellants and maintained that the Appellants were merely partners for purposes of developing the suit property.

27. The foregoing was the evidence on the basis of which the TM magistrate arrived at the impugned judgment.

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

1st Appellant's submissions:-

29. In her submissions, the 1st Appellant maintains that the suit property was allocated to her and her partner by Kenya Railways after the 1st Respondent surrendered it on 24th January, 2001 for that purpose. The 1st Appellant maintains that the TM erred by considering the evidence of the 1st Respondent as true and worthy of any credit yet it was not consistent. In this regard, she submits that the 1st Respondent lied to the court that he was the one who had been paying rent in respect of the suit property and that the timber used to effect the developments came from his farm, a fact denied by his witness, D.W.2.

30. The TM is said to have misdirected herself by referring to a letter dated 24th September, 2009 as the letter of surrender yet the letter of surrender is dated 24th September, 1997.

31. The TM is faulted for not finding that the 1st Respondent had something to hide by failing to properly instruct his advocate causing him to cease acting for him.

32. The 1st Appellant maintains that the 1st Respondent approached her to help in developing the suit property because he could not meet the terms of offer (could not pay rent in respect of the plot). The 1st Respondent is said to have demanded Kshs. 70,000/= for a portion of the plot, (portion B), which they paid. It is contended that the 1st Respondent thereafter, took them to Nairobi Railway and surrendered the plot. The 1st Respondent is also said to have taken them to the offices of the 3rd Respondent to obtain a plan for the intended developments on the suit property.

33. Despite having surrendered the plot to the 1st Appellant and her colleague, the 1st Respondent is said to have, later on, gone to the 3rd Respondent and obtained a licence over the developments on the suit property.

34. The 3rd Respondent is faulted for having given the licence without authority or consent of the appellants when it knew that the 1st Respondent had surrendered the property to the appellants. In that regard, the actions by the 3rd Respondent are said to have been illegal.

35. Despite having surrendered his interest in the suit property and taken no role in the development of the suit property, the 1st Respondent is said to have started collecting rent from tenants thereby creating the chaotic situation which is the subject of the current proceedings. The TM is faulted for having made reference to eight rooms while the dispute is in respect of 7 rooms. The order by the TM directing the 1st Appellant to continue paying rent when the bulk of the suit premises was left with the 1st Respondent is said to have been unjustified.

36. The TM is also faulted for having awarded costs of the suit to the 2nd and 3rd defendants when their involvement in the suit was minimal (they only filed statements of defence and attended court on the day judgment delivered).

37. Terming the judgment void and illegal, the 1st Appellant urges the court to set it aside as it is likely to set a bad precedent to the legal profession.

38. It is submitted that the 1st Respondent having surrendered the suit property to the appellants, was not

entitled to a share of the developments effected thereon.

39. On the order for payment of rent to Kenya railways, it is submitted that it was wrong to issue that order given that it is the 1st Respondent enjoying the whole property.

40. The order for payment of rent and costs is also challenged on the ground that it was extended to persons who are not parties to the suit or who did not actively participate in the suit.

41. The 1st Appellant maintains that she is the one who has been paying rent to Kenya Railways and who paid the rent arrears in respect of the suit property in 2002. The appellants' right to the suit property is said to have been recognized by the 3rd Respondent in its letter dated February 8th, 2005 (page 87 of the record of appeal) where it warned that it would not renew the 1st Respondent's licence unless he cooperated with them.

42. In view of the foregoing, the 1st Appellant maintains that the TM erred in dismissing her claim and urges this court to allow the appeal, set aside the judgment of the lower court and award her the costs of the appeal.

1st Respondent's submissions:-

43. In his submissions, the 1st Respondent contends that the Appeal herein is incompetent and fatally defective for misjoinder. In this regard, he explains that the 2nd Appellant died in 2007, hence is incapable of bringing the current appeal.

44. Concerning the contention that the TM erred in believing his testimony and disbelieving the 1st Appellant's testimony, he submits that the TM heard all witnesses before him and chose to believe his testimony and that the TM was right in arriving at that decision because his testimony was consistent and the 1st Appellant's inconsistent and at variance with her pleadings.

45. With regard to his relationship with his advocate, he submits that it was and could not have been a factor for the TM to consider in giving his judgment-as such cannot be a ground of appeal.

46. Concerning the contention that he failed to explain how the Appellants' came to the suit property, he submitted that he was not the one with the burden to prove how the appellants came to the suit premises. He maintained that the TM was right in holding that only Kenya Railways could shed light on that question.

47. As for the letter of allotment dated 24th September, 1997, he has submitted that the TM was right in considering it as it is the 1st Appellant who produced it.

48. With regard to the allegations that D.W.2 called him a liar, he submitted that there is nothing on record to prove that assertion.

49. On the contention that the judgment is null and void because the 2nd and 3rd defendants did not participate, it is submitted that none participation by the 2nd and 3rd Respondent is not a ground for nullifying the judgment. The 3rd Respondent is said to have had nothing to do with the allocation of the plot in question.

50. On the allegation that the TM considered extraneous matters, it is contended that he did not.

51. On the issue of costs, it is submitted that since the 2nd and 3rd respondents were parties to the suit, the TM was right in awarding costs to them.

52. Reiterating that the 1st Appellant's testimony was at variance with her pleadings, the 1st Respondent maintains that the trial magistrate was right in finding that she departed from her pleadings and that her case was not proved.

53. Urging the Court to dismiss the Appeal with costs, the 1st Respondent contends that the 1st Appellant has introduced evidence through her submissions, which is not permissible.

Analysis and determination

54. It is common ground that the suit property was first allocated to the 1st Respondent by Kenya Railways in 1997. Owing to inability to develop the suit property, the 1st Respondent invited the appellants to assist him in developing it. It is also common ground that the 1st Respondent did not sell the suit property to the Appellants and that the suit property was divided into two portions, A & B. Portion A was to be for the 1st Respondent and B for the Appellants.

55. There is evidence that the 1st Respondent took the Appellants to the Lessor (Kenya Railways) and to the 3rd Respondent (Karatina Municipal Council) with a view of introducing them to the institutions for approval of the developments they desired to effect on the suit property.

56. There is also evidence that the intended developments were effected jointly. In this regard, from the evidence on record, it is clear that the parties to this suit constructed 7 rooms out of which the 1st Respondent was put in occupation and use of 3 rooms and the Appellants 4 rooms, two each. There is evidence that before the dispute arose concerning ownership of the suit property and the developments effected thereon, it is the 1st appellant who was paying rent to the Lessor, Kenya Railways.

57. On whether the 1st Respondent surrendered the suit property to the Appellants', although there is evidence that the 1st Respondent had intention to do so, there is no evidence capable of proving that the intention was completed and if it was, whether the surrender was only in respect of a portion of the suit property or the whole of it. For lack of evidence of that fact, I agree with the TM's finding that:-

“...There is no concrete evidence to show the circumstances surrounding and leading to the alleged surrender of the plot by the 1st defendant. He who alleges must prove and as such P.W.1 was duty bound to tender clear evidence to show how 1st defendant surrendered the plot. It would have been prudent for the plaintiffs to call Kenya Railway's concerned personnel to shed light on this issue and in particular to state how a person ceases to be a proprietor of a plot”

58. In the same breath, I also find the TM to have been right in her determination that:-

“When it comes to their dealings with 1st defendant on the issue of construction, there was no written agreement to that effect. It is therefore the word of P.W.1 against that of 1st defendant and vice versa as far as the issue of construction is concerned....it is Kenya Railways who have the mandate to determine who owns what plot. But as at now, I find no evidence to indicate that the 1st defendant converted the plot to himself.”

59. In view of the above, I am unable to agree with the 1st Appellant's contention that the TM magistrate erred by arriving at the decision she arrived at concerning the suit property. However, it appears that the TM's final analysis of the arrangement that existed between the parties does not reflect the situation on the ground. In this regard, whereas the evidence on record shows that the parties constructed 7 rooms out of which the 1st Respondent held three and his partners 4, the TM erroneously stated:-

“However, since it is apparent that the construction of the premises was done by the plaintiffs and 1st defendant, then I direct that the two parties continue occupying the premises in the manner they have put themselves into with 1st defendant continuing to take up the other 4 rooms and the other 4 rooms going to the Plaintiff's side. Further that since it is apparent that 1st Plaintiff is the one who has been paying rent to Kenya Railways, she should then continue to do so”

60. Whereas it is true that from the arrangement entered into between the parties, it was the 1st

Appellant who was to pay rent to Kenya Railways, from the 1st Respondent's own testimony, the only reason as to why the 1st appellant was to do so is because, she allegedly had received the extra room. The evidence on record does not bear that fact. In fact, the evidence on record shows that it is the 1st Respondent, who all along has had the three rooms out of which one was to be used for paying rent to Kenya Railways. To this extent, I find the judgment to be unsupported by the evidence on record.

61. On whether none participation of the 2nd and 3rd Respondent vitiated the judgment, I agree with the submissions by the 1st respondent that none participation cannot vitiate a judgment. The burden was on the 1st Appellant to prove all allegations made against all the parties to the suit. The 2nd and 3rd Respondents had no role to play in proving the Appellants' case. There is no evidence that the Appellants suffered any prejudice owing to their none participation in the suit.

62. On whether the TM erred in awarding costs to the 2nd and 3rd Respondents when they had not actively participated in the suit, I find that lack of active participation in a suit to be incapable of forming a basis for denying a party to a suit their right to an award of costs. Active participation of a party to proceedings can only affect a party's bill of costs and not their entitlement to costs.

63. On whether the current appeal is fatally defective for misjoinder, I do not agree with the 1st Respondent that misjoinder renders a suit defective or fatally defective. In this regard see, **Order 1 Rule 9** of the Civil Procedure Rules which provides as follows:-

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

64. The upshot of the foregoing is that the TM was right in finding that the Appellants did not prove the case as pleaded. The Trial magistrate was also right in holding the parties to the arrangement they had put themselves into. However, she misapprehended the arrangement made between the parties and as a result arrived at the wrong conclusion on the matter. For that reason, I find the Appeal to have merit to the extent that it challenges the TM order directing the 1st respondent to continue holding four rooms out of the Seven rooms and directing the 1st appellant to continue paying rent to the Lessor yet she is not the one in possession of the room reserved for payment of rent to the Lessor, Kenya Railways.

65. For the foregoing reasons, I allow the appeal and set aside the judgment of the lower court and substitute it with an order directing that the 1st Appellant and the Representatives of the Estate of her partner, continue holding the 4 four rooms reserved for them, two for each partner, and the 1st Respondent to continue having possession and use of the three rooms he has been holding. Since it is the 1st Respondent holding the room meant for paying rent to the Lessor, he will be the one to pay rent in respect of the suit property.

66. As the appellant has partially succeeded in her Appeal, she shall have half the costs of the Appeal. Each party shall bear their own costs of the suit at the lower court.

Dated, signed and delivered at Nyeri this 9th day of June, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Catherine Wangui Muita – 1st applicant

Deceased – 2nd applicant

John Muriuki Wathure – 1st respondent

N/A for 2nd respondent

N/A for the 3rd respondent