



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
CIVIL APPEAL NO.41 OF 2011

JOYCE MWIHAKI.....APPELLANT

VERSUS

MARIA NYOKABI KIBUNJA.....RESPONDENT

J U D G M E N T

Maria Nyokabi Kibunja (*hereinafter referred to as the Respondent*) sued Joyce Mwihaki (*hereinafter referred to as the Appellant*) in the lower court for an order to compel the appellant to account to her for all the rental income and proceeds from the commercial structures or houses and to restitute all that income found due and payable.

She further prayed for an injunction to issue to restrain the appellant, her servants, and or agents from in/any way dealing, entering, infringing and or trespassing on her land and that she be evicted from the plaintiff's piece of land known as **NYERI/NARUMORU/100**.

The respondent pleaded in the plaint dated 25/9/2009 that she was registered as the absolute proprietor of all that peace of land known as NYERI/NARUMORU/100. In contravention and infringement of her exclusive right of ownership and quiet enjoyment, the appellant had without any license and or permission trespassed her said land and appropriated for her own use one of her houses and livestock thereon. She stated that the appellant had further converted her rental structures and collects rent without any license and or her express and or implied consent and had also converted such rental income and or profits to her own use. She claimed to have no filial or any relationship with the appellant in any manner or at all as the latter was neither her daughter nor blood relative, any close and or distant relation to her in any event or at all. The respondent sought against the appellant an order for eviction and damages for trespass to her land and an account on all profits and or rental income from the appellant from the date of her entry into the land on December 2008 to the time of exit and reimbursement or restitution of the amounts found due. She further sought an order of mandatory injunction to restrain the appellant her agents servants or employees from in any way interfering, entering, infringing into her piece of land.

The appellant conversely in her defence dated 3/3/2011 stated that she had been in occupation of the premises with tacit permission of the respondent as her daughter in law married to one Simon Muriuki Kibunja now (deceased). She claimed that the rental structures alluded to were constructed by her late husband and from which she has been making a living to support herself during and after her husbands life time. She also pleaded that the Chief Magistrate's Court had no jurisdiction to entertain this matter.

It was the respondent testimony on oath that she is the registered owner of

NYERI/NARUMORU/100 having inherited the same from her husband. She knows the appellant as a person who used to work at her home and who has disturbed her from enjoying the use of her property. She was told to stop using and trespassing on the respondent's land but has not stopped. She ties her cows on respondent's land where there are food crops and therefore respondent was desirous that she vacates the property without paying any damages.

On cross-examination by Ng'ang'a she stated that Joyce came to her property after she welcomed her and gave her land to farm but she is now stuck and stays there. Though she does not admit that the appellant and her son Simon Muriuki were married, she agrees that they were lovers and had a son called Muriuki Kibunja named after the respondent's husband under the Kikuyu Customary Law. She remained on the respondent's land after her son's death. The respondent stated that if the appellant stopped disturbing her she could be allowed to stay on the land but she has continued doing bad things to her by even calling the police to arrest her. Her land has not been subdivided and distributed to her children. The respondent inherited the land from her husband and Joyce stays on the land with her son (*respondent's grandson*).

PW2 was the son of the respondent who knew the appellant and that she stayed on their land. He stated that his late brother Simon Muriuki Kibunja was not married to the appellant. He further states that the appellant farms on the land No. NYERI/NARUMORU/100 which belongs to his mother. There is one part for the appellant where she has cows and the other part for the respondent. The appellant was the last woman the deceased Simon Muriuki stayed with before death.

On cross-examination by Mr. Ng'ang'a he states that Joyce had 2 children one a boy whose age he did not know. He identified the children in the photographs produced as exhibits.

The appellant on her part testified that the respondent is the mother of her late husband. She was married by Simon Muriuki in the year 2005 and were blessed by the children Lilian Wamaitha and Dominic Mwangi. Her husband died in the year 2008 hence she went to the home due to the marriage. She was present at the funeral of Simon Muriuki. She produced photograph as evidence.

In cross-examination she reiterates that when she was married, her mother in law and husband welcomed her to the land belonging to the respondent and lives in structures built by her late husband.

DW2 was George Mwangi Maina, the Assistant Chief of Munyu sub-location and a brother to the appellant gave evidence that the appellant was married to Simon Muriuki in the year 2005 and stays in his home to date.

In cross-examination he states that he does not know what Ngurario means but knows Kurachia. He does not know whether dowry was paid. This court observes that had it been paid then the DW2 could have known being the appellant's brother.

DW3 was a photographer and a neighbour of both the appellant and respondent. He took photographs during the funeral of the husband of Joyce Mwihi, Simon Muriuki Kibunja the deceased whom he knew very well.

In her submissions in the lower court, the respondent submitted that the appellant was rude insolent and destructive and generally harassed the appellant despite the latter being the absolute owner of the property. Moreover that the appellant did not prove any marriage whether customary or done under any legal method. On the issue of jurisdiction, the respondent submitted that the court had jurisdiction.

The appellant filed his submissions in the lower court where she argued that the court lacked jurisdiction by virtue of Section 3(1) (b) and (c) of the Land Dispute Tribunal Act No.18 of 1990.

Secondly she argued that it should not be public policy that when a husband dies the wife is sent away. She argues that the respondent wants to send the appellant away because her husband died. The appellant further argued that her rights as a married under Article 40 of the Constitution were protected as

she had interest in the land.

Last but not least, the appellant argued in the lower court that Section 35 of the Law of Succession Act clearly indicates that a surviving spouse is entitled to a life interest only.

The lower court after hearing the evidence and listening to the submissions of parties directed itself properly as to the issues to be determined thus;

I. *Whether the court had jurisdiction to entertain this matter.*

II. *Whether the defendant had any legal right to keep staying on the plaintiff's land.*

On the issue of jurisdiction the court found that it had the jurisdiction to entertain the suit as the claims before it were an order of account and a permanent injunction.

On the second issue the court found that the deceased and appellant may have stayed together for periods disputed by the parties but in the whole relationship there was no evidence of marriage. In the absence of marriage between the two the court was not convinced that the appellant had any legal rights and went further to hold that evidence of a child does not prove a marriage.

The issue of public policy and constitutional rights of the appellant was raised but rejected by the court. On the issue of public policy the honourable magistrate held that the matter before him was based on private property rights over that of a licence. On the issue of constitutional rights, the court found that the same were not raised.

The appellant has come to this court on appeal on grounds that;

- 1. *That the learned magistrate erred in law and fact for finding as he did that he had jurisdiction to hear and determine a suit hedged on trespass.***
- 2. *That the learned magistrate erred in law and fact for failing to find that the suit and the prayers sought were against public policy.***
- 3. *That the learned magistrate erred in law and fact for totally ignoring the appellant's evidence in her defence.***
- 4. *That the learned magistrate erred in law and fact for failing to uphold the appellant's defence of necessity lawful authority and/or licence and proceeding to pass judgment in favour of the plaintiff.***

He prays that the judgment of the trial court in Nyeri CMCC No.540 of 2009 be set aside and there be an order that the respondent's suit in the lower court be dismissed with costs to the appellant.

On the issue of jurisdiction, the appellant argues that when the plaint was filed, the Land Disputes Tribunal Act No.18 of 1990 was still operating. Section 3(1) (b) & (c) of the said Act clearly puts matter concerning trespass and claims to occupy or work hard under the Land Disputes Tribunal. He submits that the issue before the court was trespass.

On public policy, he argues that Section 29, 28 and 40 of the Constitution of Kenya guarded the rights and freedom of individuals including the right to property. Courts have a duty to interpret the constitutional provisions whenever the need arises.

Lastly, the appellant argues that the issue of marriage was not before the magistrate. He ignored the defence and decided on extraneous matters.

The respondent in his written submissions submits that the court has inherent Jurisdiction under

Section 3 & 3A of the Civil Procedure Act to determine prayers sought. The said prayers were a permanent injunction and for the defendant to account for rental income.

On the issue of public policy, the respondent argues that the matter before court was not on public policy but private properties rights. On the issue of a licence, the respondent argues that the appellant was not a child of the respondent but a girlfriend of her son. She remained on the land as a license and not a wife.

This court has considered the rival submissions and agrees with the direction of the lower court that there were two issues to be considered thus ***whether the court had jurisdiction to entertain this matter and whether the defendant had any legal right to keep staying on the plaintiff's land.***

To begin with, this dispute was brought to court before the repeal of the Registered Land Act Cap 300 Laws of Kenya and therefore it has to be decided within the ambit of that law. The Land Disputes Tribunals Act No.18 of 1990 took away the jurisdiction of magistrates court to deal with certain disputes such as trespass to land, claims to work land *inter alia* but did not take away the jurisdiction in respect to disputes relating to title to land as the latter was left to the jurisdiction of the High Court and the magistrate's court. With the promulgation of the Constitution of Kenya 2010 there came a new order and the Land Disputes Tribunal Act no 18 of 1990 was repealed. The Constitution empowered parliament to establish special courts to hear disputes relating to Environment and Land. Parliament has enacted the Environment and Land Court Act of 2011 which establishes the court and clothes it with jurisdiction.

The appellant was allowed by the respondent to enter the land on the basis of her relationship with the respondent's son. They lived with the son on the portion of the parcel of land shown to them by the respondent and had a family that included a son named after the respondent's husband. Unfortunately the son died and was buried on the said portion of land. The appellant attended the funeral service and was pictured standing in front of the coffin with her children. This facts do not reflect a trespasser as the appellant was allowed to farm on the land and constructed structures on the same where she lived with the respondent's son for sometime before she left only to resurface during the funeral. After burial she continued living on the property todate save the suit herein.

The above facts depict a dispute that is not trespass to land but the dispute is based on a belief by the appellant that she has a right to live on the property. She occupies the land on belief that she was married to the late Simon Muriuki Kibunja. Such a dispute could not have been within the jurisdiction of the Land Disputes Tribunal as it was not contemplated by Section 3(1) (a) & (b) of the Land Disputes Tribunal Act NO.18 of 1990. The appellant having been registered as proprietor of the land parcel in issue as after inheriting the same from her deceased husband held the land as a proprietor with life interest and upon her death the property would be transmitted to her heirs including Dependants of her deceased son Simon Muriuki Kibunja whose interest will be succeeded by his son Dominic Mwangi. Though there is a tittle deed indicating that the respondent is an absolute proprietor in her testimony she states that she inherited the land from her husband and therefore the tittle can be challenged. This are issues that go for beyond trespass and cannot be determined by the Land Disputes Tribunal. The appellant's argument on jurisdiction is therefore dismissed.

On the second ground of public policy as opposed to private properties rights, this court finds that the respondent is a trustee of the property by virtue of the provision of Section 35 of the Law of Succession Act and holds the property in life interest and not absolute proprietorship. The life interest will be extinguished upon her death and therefore the property will revert to her children. However, if she intends to subdivide the land then she has a duty to do so knowing that she is a trustee and not absolute proprietor and therefore has no power to evict her grandson and his mother from the property who became beneficiaries of the estate of the husband of the appellant Mr. Simon Muriuki Mwangi who was the son of the respondent before his demise and who had been given a portion of land by the respondent and had developed the same, cohabited with the appellant who gave him a son and named him after his father.

I agree with Mr. Ng'ang'a that the issue of marriage was extraneous and the honourable Magistrate

erred when he went at length to find that there was no marriage between the appellant and the respondent's son.

The upshot of the above is that the appeal is allowed the principle of Trust envisaged by section 35 of the Law of Succession Act Cap 160 Laws of Kenya which Mr. Ng'ang'a refers to as public policy is upheld, and the respondent being a spouse is entitled to a life interest in the whole residue of the net intestate estate of her husband and the estate of Simon Muriuki Kibunja the father of appellant's son is entitled to a portion of the same.

The judgment of the trial court in Nyeri CMCC No.540 of 2009 is set aside and the plaintiff's suit is dismissed with no order as to costs this being a family dispute.

Dated, signed and delivered on 20th day of June 2014.

A. OMBWAYO

JUDGE