



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)

CIVIL APPEAL NO. 5 OF 2019

BETWEEN

EPHUNTUS KIHARA GUCHU.....APPELLANT

AND

GRACE GATHONI MATU.....1ST RESPONDENT

MARY MUTHONI MBUGUA.....2ND RESPONDENT

LEAH WAMBUI KIMANI.....3RD RESPONDENT

JOSPHNE MUTHONI WAMWEA.....4TH RESPONDENT

DEAS WANJIRA NJOKI.....5TH RESPONDENT

(Officials of Multipurpose Women Group)

(Being an appeal from the Judgment of the Environment & Land Court

at Malindi (Olola, J.) delivered on 14th December, 2018

in

ELCCC No. 20 of 2015)

JUDGMENT OF THE COURT

1. In a suit filed before the Resident Magistrate's Court at Mombasa, the appellant, Ephuntus Kihara Guchu, claimed that by an agreement for sale made on 24th October 2007, the respondent, being the officials of Multi-Purpose Women Group, described in the plaint as "a society registered under the Societies Act Cap. 108 Laws of Kenya" (the Group) sold to him "a plot without title" for Kshs.30,000.00; that upon purchasing the plot he began construction; that in breach of the agreement, the respondent interfered with his quiet possession of the property and that on 6th May 2011, the respondent trespassed on the property and demolished his house thereby occasioning him loss and damage.

2. He prayed for judgment for general damages for breach of contract; a permanent injunction to restrain the respondent from interfering with his possession and occupation of the property or alternatively the sum of Kshs.30,000.00; the value of the demolished house in the amount of Kshs.200,970.00; and loss of future earnings from the demolished house.

3. In a statement of defence, Grace Gathoni Matu, on behalf of the respondent denied the claim. She averred that the respondents "are members of Mpeketoni Multipurpose Women Group which has no capacity to be sued". It was denied that the appellant had purchased the property as he alleged; that the appellant's wife, who was the treasurer of the Women Group's at the material time, had during her tenure as treasurer, constructed a semi-permanent house of the property and led the members of the Group to believe that it belonged to the Group; that after the leadership in the Women's Group changed, it was discovered that the appellant had colluded with his wife to defraud the Group of

the property; that upon that discovery demand was made upon the appellant to cease construction on the property; and that the appellant had no right to the property and his suit was therefore unfounded.

4. The trial was conducted before **C.M. Nzibe**, Resident Magistrate Malindi. The appellant testified on his own behalf, while Grace Gathoni Matu testified for the respondents. In a judgment delivered on 18th March 2015, the trial court was satisfied that the appellant had established that he purchased the property from the respondent; that the respondent had not established to the required standard that the purchase of the property was procured fraudulently; and that there was nothing to impeach the sale of the property to the appellant by the former of officials of the women's group.

5. The trial court awarded the appellant, “Kshs.300,000 for breach of contract and damage to his house”; compensation of “Kshs.48,890 as part of costs incurred in construction of the house on the suit land”; and a permanent injunction restraining the respondents from interfering with the appellant's peaceful occupation and enjoyment of the property; interest and costs.

6. Aggrieved, the respondent appealed to the High Court. In a memorandum of appeal containing twelve grounds of appeal, the respondents faulted the judgment of the trial court on grounds that the judgment was invalid and not enforceable as it was made against people who were not parties to the suit; that it was delivered on a date when the magistrate was not sitting; that the magistrate was partial to the appellant; that the court granted reliefs that were neither pleaded nor sought; that there was absolutely no basis for the award of Kshs.300,000; that the alleged transaction was riddled with illegalities and irregularities; that the suit was instituted against the wrong parties, viz, “*against 5 individuals as office bearers of the registered owner of the land*”; that documentary evidence was irregularly produced and admitted; that the trial court failed to appreciate that the appellant failed to perform due diligence and conduct searches in respect of the property prior to the purchase to ensure he was rightfully purchasing land that was available.

7. On those grounds, the respondents urged the High Court to set aside the judgment of the trial court and to substitute therefor an order dismissing the suit before the trial court.

8. That appeal was heard before **J.O. Olola, J.** of the Environment and Land Court (ELC) at Malindi who in a judgment delivered on 14th December 2018 set aside the judgment of the trial court and substituted the same with an order striking out the appellant's suit in the lower court. In doing so, the Judge stated:

“In my mind, a number of individuals may come together and form an identifiable group. They may take action as a group but that does not mean that the group is not vested with legal capacity to sue and to be sued. Unincorporated entities have no legal capacity and cannot therefore sue or be sued in their own names. Mpeketoni Multi-Purpose Women was one such entity.

Arising from the foregoing, I did not consider that I needed to look at any other of the 12 grounds of appeal listed herein. In the circumstances, the judgement, award and decrees (sic) entered in favour of the Respondent is hereby set aside and is instead substituted with an order striking out the plaintiff's case in the lower court.”

9. The appellant has challenged that judgement on the grounds that the Judge of the High Court did not properly analyze the facts afresh and come up with independent conclusions; that the Judge misunderstood the case by treating the defendant as an unincorporated body, yet the respondents were sued in their capacity as officials; that the Judge relied on a misdescription of the parties in the plaint and determined the appeal on pure technical aspects instead of analyzing the evidence and the facts.

10. **Ms. Bwanaadi**, learned counsel holding brief for **Mr. Obaga** for the appellant relied entirely on written submissions in which it was urged that the Judge only dealt with one of the twelve grounds of appeal that were before him; that the Judge failed to appreciate that the respondents were sued in their capacity as officials and had the capacity to be sued as such; that the misdescription of the parties in the plaint was clearly an oversight on the part of the advocates as it was clearly pleaded in paragraph 2 of the defence that, “*the defendant is a society registered vide Society Act Cap 108 Laws of Kenya.*”; that the Judge placed undue emphasis on the misdescription instead of looking at the substance of the case in accordance with the overriding objectives.

11. In urging us to allow the appeal, it was stressed that the Judge erred in removing the appellant from the seat of justice on account of a misdescription of parties and for failing to delve into the other grounds of appeal.

12. Opposing the appeal, learned counsel **Mr. Nyongesa** holding brief for **Ms. Marubu** for the respondents also relied entirely on written submissions. It was submitted that only matters of law should be considered as this is a second appeal; that the Judge was right in concluding that the suit was defective on account of a group of women having been sued as officials of an organization which had no capacity to be sued; and that the Judge had the discretion to determine the appeal on only one of the twelve grounds of appeal.

13. It was also submitted that the suit in the court of first instance was filed against individuals who were not the registered persons on the disputed land; that the registered entity was never made a party to the suit and no summons was ever issued against, Multipurpose Women Group; that the decree cannot be executed against the respondents personally, “*being merely officials of a registered entity*”; that the said Multipurpose Women Group is a registered society with powers to sue and to be sued; that the judgment of the trial court was against people who were not parties to the suit and who had ceased to be officials of the Women's Group by the time the judgment was pronounced.

14. It was urged that a remedy could only issue against the purported vendor, Multipurpose Women Group and the appellant wrongly purported to execute the decree of the trial court against the respondents in their private and personal capacities.

15. It was submitted further that the suit property, referred to in the submissions as Title Number Lamu/Lake Kenyatta 1/278, registered in the names of Multipurpose Womens Group, is agricultural land under a controlled area under the Lamu Land Control Board; that consent of

that board was not obtained and consequently the alleged sale in favour of the appellant is void by reason of Section 6 of the Land Control Act; that the trial magistrate therefore erred in concluding that the sale in favour of the appellant is a valid sale.

16. Further, it was submitted that the award of damages of Kshs.300,000 was not justified; that if any remedy is available to the appellant, it would be a refund of the sale price.

17. We have considered the appeal and submissions. Two issues arise. The first is whether the respondents, as official of Multipurpose Women Group, were properly joined as parties in the suit and whether the Judge of the High Court was right in striking out the appellant's suit on the ground that "*Multipurpose Women Group was merely a formation of a group of women and had no capacity to be sued.*" The second issue is whether the Judge erred in disposing of the appeal on only one of the 12 grounds of appeal and in failing to consider the appeal before him in its entirety.

18. On the first issue, the plaint as initially instituted, named Alice W. Magu, Cicilia Kihara, Teresia Wanjohi and Helen Muthoni "*officials of Multi-Purpose Women Group*" as the defendant. Subsequently, in the amended plaint, those names were deleted and substituted with the names of Grace Gathoni Matu, Mary Muthoni Mbugua, Leah Wambui Kimani, Josephine Muthoni Wamea and Deas Wanjira Njoki again sued as "*officials of Multi-Purpose Women Group*".

19. In paragraph 2 of the plaint as well as the amended plaint, it was pleaded that "*the defendant is a society registered under the Societies Act Cap. 108 Laws of Kenya.*"

20. It is therefore clear from the pleading that the individuals mentioned were sued, not in their individual or personal capacities, but as officials of a society. There is undoubtedly a mix up in the name of the society. It is referred to on occasions as Mpeketoni Multi-Purpose Women Group and as Multi-Purpose Women Group in other occasions. Whatever the name, and no issue was raised in that regard, what is clear is that it was sued in the names of its officials.

21. We agree with the Judge to the extent of his expression that Mpeketoni Multi-Purpose Women Group, as a society, is not "*vested with legal capacity to sue and to be sued*". In *John Ottenyo Amwayi & 2 others vs. Rev. George Abura & 2 others, Nairobi H.C.C.C No. 6339 of 1990, Bosire J.*, as he then was, opined:

"The Societies Act does not contain provisions with regard to the presentation and prosecution of suits by or against unincorporated societies. It would appear to me that the legislature did not intend that suits be brought by or against those societies in their own names."

22. There are many subsequent decisions of the High Court to the same effect. See for example *Andrew Inyolo Abwanza vs. Board of Trustees of Pentecostal Assemblies of God-Kenya & 2 others [2009] eKLR*; *Trustees Kenya Redeemed Church & another vs. Samuel M'Obuya & 5 others (2011) eKLR*; *Skairs Associates Architects vs. Evangelical Lutheran Church of Kenya & 4 others [2015] eKLR*.

23. In those and other decisions, it has consistently been held that registered societies do not have legal personalities capable of suing and being sued in their own names but through their officials or trustees in accordance with their respective constitutions.

24. In the present case, the learned Judge appears to have overlooked that the society was sued through its officials with the result that he fell into error in ordering the striking out of the appellant's "*case in the lower court*".

25. Turning to the issue whether the Judge erred in failing to consider the appeal before him in its entirety, it is common ground that beyond addressing the question of the capacity of the society to be sued, the Judge did not consider any of the other 12 grounds of appeal. Consequently, this Court does not have the benefit of input by the High Court on the grievances raised by the respondent in its memorandum of appeal against the decision of the trial court.

26. The appeal therefore partially succeeds. The judgment and order of the High Court is hereby set aside. We substitute therefore an order, in accordance with Rule 31 of the Court of Appeal Rules, that the matter is hereby remitted back to the Environment and Land Court, before a Judge other than **Olola, J.**, for the rehearing and determination on merits of the respondent's appeal from the judgment of the trial court. Each party will bear its own costs of the present appeal.

Dated and delivered at Nairobi this 3rd day of April, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a truecopy of the original.

Signed

DEPUTY REGISTRAR