



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KARANJA, KIAGE & SICHALE, JJ. A)

CIVIL APPEAL NO. 21 OF 2016

BETWEEN

JORAM MUNGAI KIBERENGE.....1ST APPELLANT

ROBERT KIMANI KIBERENGE.....2ND APPELLANT

ASAPH WAINAINA KIBERENGE.....3RD APPELLANT

DAVID KARANJA KIBERENGE.....4TH APPELLANT

GADSON NGUGI KIBERENGE.....5TH APPELLANT

ELIZABETH WAIRIMU.....6TH APPELLANT

AND

PETER GIKONYO CHIUGA

(Legal Representative of JENNIFER NJOKI (deceased)).....1ST RESPONDENT

BEATRICE WANGUI NGINGA.....2ND RESPONDENT

(Being an Appeal against the Judgment and Decree of the High Court of Kenya at Nakuru

(D.K. Maraga, J. (as he then was)) dated and delivered on 15th April, 2011

in

H.C.C.C. No. 8 of 2008)

JUDGMENT OF THE COURT

1. This appeal emanates from the judgment and decree of the High Court at Nakuru, (Maraga, J. (as he then was)) entered in favour of the respondents granting orders, *inter alia*, that: each of the respondents are entitled to one third of **L.R No. 533/426** (herein after referred to as “the suit property”) situated in Molo town and; that the existing title to the suit property be cancelled, the suit property be subdivided into three equal portions and fresh titles be issued.

2. The genesis of this matter as pleaded by the appellants in the trial court was that they were the registered owners of **L.R No. 533/426** the suit property situated in Molo Town in Molo District measuring approximately 5.922 hectares. On 29th January, 2008 the appellants instituted a suit against the respondents herein seeking among other orders: a permanent injunction to restrain the respondents by themselves, their representatives, servants or agents from entering, remaining or in any other way interfering with their use and enjoyment of the suit property and; general damages for use of the portion of land occupied by the respondents from 15th October, 2007 until the time they vacate.

3. It was the appellants’ case that the suit property was originally registered in the name of their deceased father, one Eliud Kiberenge Njoroge, from 9th January, 1975 under a 99-year lease from 1st December, 1972.

4. It was averred that the defendants had instituted a claim before Molo Land Dispute Tribunal, a body not established by law, vide Dispute No. 6 of 2007 claiming a portion of the suit property. Further, that the decision and subsequent award by the tribunal in favour of the respondents made on 20th November, 2007 and adopted by the Senior Principal Magistrate Court at Molo as a judgment of the court on 10th June, 2008, enabled the respondents to continue interfering with their use and enjoyment of a portion of the suit property to the detriment of the appellants.
5. Testifying on behalf of the other appellants, PW1, the 5th appellant, deposed reiterating the averments on the face of the plaint save for that he did not know when the respondents occupied the land and averred that there were no buildings on the suit property and that nobody lived there.
6. Further, he testified that it was within his knowledge that his father and the respondents' husbands were his father's business partners and that they had a secondary school and commercial college at Molo. However, the same were not on the suit property.
7. He deposed conceding that indeed the respondents' husbands challenged the legality of his father's ownership of the suit property on allegations of fraud vide Molo Land Dispute Case No. 83 of 2007 but did not know what became of the matter.
8. The respondents opposed the claim vide a defence and counterclaim. It was averred that the appellants are not tenants in common over the suit property as the alleged title registered in Eliud Kiberenge Njoroge's name was fraudulent hence illegal and a nullity in law.
9. It was contended that the award of the tribunal adopted as a judgment of the Court remains unchallenged. Further that the respondents have been in actual possession of their respective shares of the suit property since 1973 to date.
10. On counterclaim, it was averred that: the respondents claim equal shares in the suit property; the appellants' title was null and void following the fraudulent registration by the original title in Eliud Kiberenge Njoroge's name and; there was a pending appeal in H.C.C.C No. 49 of 2008.
11. In sum, the respondents prayed that the appellants' title be cancelled and that the suit property be shared in three equal parts.
12. During trial, DW1, one Jennifer Njoki, recapped the averments as on the face of the defence and counterclaim save for that her husband and that of the 2nd respondent were in a registered partnership with the appellants' father owning a school in Molo known as Rift Valley Secondary School, established in 1969. The appellant's father was the chairman and the manager of the school.
13. It was deposed that the partners contributed various amounts and were allocated the suit property. They used part of it for purposes of running the school and the rest was shared in 2-acre portions each.
14. It was averred that following the unresolved land disputes between the parties, the respondents sought to resolve the same, but their efforts were frustrated by the appellants.
15. DW2, Simon Gichohi Kimotho, a nephew of the 2nd respondent's husband reiterated the contents of the defence and counterclaim and DW1's testimony that he used to live with his uncle on the suit property to date; DW3, the 2nd respondent reiterated DW1 and DW2's averments.
16. Upon consideration of the pleadings, evidence before the court and rival submissions by parties, the learned Judge held in favour of the respondents, granting orders as prayed.
17. Aggrieved, the appellants herein proffered the instant appeal raising 7 grounds *inter alia* that the learned Judge erred by: finding that the respondents were entitled to a portion of the suit property against the weight of evidence to the contrary; failing to address the issue of whether the respondents were claiming as personal representatives or adverse possession; failing to consider that the initial suit instituted by the respondents' husbands challenging the ownership of the suit property had abated and; failing to consider the issue of fraud.
18. During the plenary hearing of the appeal parties were represented by counsel. Mr. Mindo appeared for the appellants while Ms. Njoroge appeared for the respondents.
19. Urging the Court to allow the appeal, Mr. Mindo submitted that the learned Judge was not clear as to whether the respondents were suing in their own capacity or as personal representatives of their husbands. He maintained that there was another suit that had been filed earlier before the High Court which had since abated and that the respondents ought to have pursued the same to determine ownership of the suit property.
20. In opposition, Ms. Njoroge submitted that the appellants did not challenge the legal capacity of the respondents. Moreover, the suit before the trial court was instituted by the appellants who sued the respondents in their own personal capacities as evidenced on the face of the plaint. She contended that the issue of adverse possession does not arise as the respondents' claim was based on co-ownership and not adverse possession.
21. In response, Mr. Mindo submitted that adverse possession was not proved.
22. Being the first appeal, the duty of the first appellate court were as coined in the case of **Selle -v- Associated Motor Boat Company Ltd (1968)** where this court held thus:-

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan, (1955), 22 E.A.C.A. 270).”

23. Having analyzed the record, the grounds of appeal and the parties’ respective submissions as cited the only issue that turns for determination are:-

a) Whether the suit before the trial court was one for adverse possession or a suit by personal representatives of their late husbands and if so the implications thereto.

b) Whether the trial court failed to address its mind on the legal consequences of abated proceedings vis a vis any subsequent suits on the subject matter before the court and the implications thereof.

c) Whether the respondents were entitled to a third (1/3) of the suit premises as held by the trial court.

24. On the first issue, the appellants have extensively faulted the decision of the trial Judge on two accounts i.e. for failing to address himself as to the nature of the proceedings before him; and on whether the same were founded on fraud or on a claim for adverse possession and failing to address the capacity of the respondent as far as the proceedings are concerned. The appellant submitted that the learned judge was never clear as to whether the respondents were suing on their own capacity or as personal representatives of their deceased husbands.

25. It is evident that the suit before the trial Court was instituted by the appellants as against the respondents. It is therefore not disputed that the respondents were sued in their individual capacities by the appellants seeking various reliefs. They in turn filed a defence and simultaneously filed a counter claim against the appellants. It was therefore not upon the Court to decipher the issue of capacity as the same was evident on the face of the pleadings as filed by the appellants herein. Furthermore, having assigned the capacity they did to the appellants, the respondents could not turn around and challenge the same saying it was not clear whether they were sued in their personal capacities or as representatives of their late husbands’ estate.

26. Further, upon filing their defence and counterclaim, the respondents maintained the capacity in which they had been sued by the appellants. The appellants duly responded by filing a reply to defence and counterclaim dated the 12th October, 2008. It is evident from the said defence and counterclaim that the appellants never challenged the issue of capacity of the respondents herein as far as the suit and the claims were concerned in order to invite the court to make a finding in that respect. It is therefore not open to the appellants to fault the trial court over an issue that was never raised at all.

27. The question of the nature of the proceedings before the trial court is also not in doubt as the parties’ cases were respectively pleaded and the pleadings as filed are quite clear. The nature of the respondents’ claims was expressly pleaded and there was no invitation whatsoever on the part of the Court on a question of adverse possession. In any event, the Civil Procedure Rules circumscribe the procedure by which a claim for adverse possession may be instituted by any party to be by way of an Originating summons. Having perused the record, although the respondent mentioned the issue of adverse possession in their submissions filed before the trial court, the same was made merely in passing but did not form the substratum of the issue in dispute or one that called for determination by the trial court. It was therefore not open to the learned Judge to craft his own issues and deviate from what was pleaded before him and determine issue not canvassed on the face of the pleadings.

28. In the case of **Political Parties Forum Coalition & 3 Others -v-Registrar of Political Parties & 8 Others (2016) eKLR** this Court cited with approval a Nigerian decision where it stated as follows:-

“...the judges sit to hear and determine the issues raised by the parties and not on conduct of an investigation or examination on behalf of the society at large. In the Nigerian case of Adetoun Oladeji (Nig) Ltd - v- Nigeria Breweries Plc S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows:

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.” (Emphasis added)

29. In view of the foregoing, the arguments advanced by the appellants in ground 2, 4 and 5 of the Memorandum of appeal have no merit whatsoever and must fail.

30. On the second issue, the appellants faulted the trial Judge for failing to direct his mind to the legal consequences of the suit that had abated *vis-a-vis* any subsequent suits on the same subject matter. The appellant submitted that there was another case being High Court **Case No. 267 of 1975**, which had abated and that the respondents could not file another one as they would be caught up by **Order 24 rule 2** of the Civil Procedure Rules. The appellants further submitted that the said suit would have resolved the ownership issue with finality if it would have been pursued.

31. We have perused the entire record of the proceedings and we cannot seem to find the pleadings filed in respect of the said suit. Even assuming that the said suit indeed existed as posited by the appellant, the respondent did not specifically plead the said issue before the trial court either by way of the reply to defence filed or raised in the form a preliminary issue for the same to crystallize as an issue for

determination by the court. We therefore find no merit on this ground either. The issue ought to have been raised for the parties to canvass the same and to allow the trial court make a finding on the same. Having failed to do so, the appellants cannot fault the trial Judge for not addressing his mind to the same. We hold the view that this ground has not been established and must also fall by the wayside.

32. On the third issue, the appellant faulted the trial Judge for holding that the respondents were entitled to a third of the suit property each. The appellant did not expressly address this ground in its submissions as filed before the trial court. We have perused the evidence adduced by the parties before the trial court and it follows that the respondents tendered evidence which gave an account of their claim or the basis of their legal right to the suit land. According to the evidence produced before the trial court, the respondent's claim to the suit land stemmed from a partnership agreement between the appellants' father, one Eliud Kiberenge, the 1st respondent's husband one Chege Wamuntongo, Mutunaji Kamau and one John Ngiga Kamotho. According to the evidence adduced, the said persons were partners who had been allocated the said land. The respondents faulted the appellants' father for registering the said property in his sole name. It was on the basis of the said partnership that the claim for sub-division of the land into three portions was made.

33. Upon considering the totality of the evidence adduced, the trial Judge held that the evidence as adduced by the respondent's had not been controverted as the appellants simply stated that they knew none of the alleged partnership.

34. It is trite that this Court, as an appellate Court, will rarely interfere with findings of fact by a trial Court unless it can be demonstrated that the trial Judge misdirected himself or acted on matters which he/she should not have acted upon or failed to take into consideration matters which he/she should have taken into consideration and in doing so arrived at a wrong conclusion. (See: **Political Parties Forum Coalition & 3 Others - v- Registrar of Political Parties & 8 Others (2016) eKLR.**)

35. Further, in **Samuel Gichina Muiruri -v- Evanson Kimemia (2002) eKLR**, this Court held as follows:-

“In this appeal we are being asked to interfere with the learned Judge's findings of facts. This Court would rarely interfere with findings of fact made by a trial Judge who had the advantage of seeing and hearing the witnesses, unless it is satisfied that there was a misapprehension of the facts on the part of the trial Judge or that he/she overlooked some evidence having a bearing upon the case. It does not appear to us that this is a case in which this Court would be justified in reversing the decision of the trial Judge founded on the Judge's opinion of the credibility of witnesses formed after seeing and hearing their evidence.”

36. Turning to the present case bearing in mind the legal principles espoused in the above cited cases, the appellants have not placed sufficient material before this Court to justify interference and/or a departure from the factual findings as held by the trial court which had the opportunity to interact with the witnesses by examining their demeanour during testimony. It is therefore our view that the appeal on this ground fails.

37. Ultimately, having considered the entire record and for the foregoing reasons we come to the conclusion that this appeal lacks merit. The same is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 19th day of June, 2020.

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR