



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, KIAGE & KANTAL, J.J.A.)

CIVIL APPEAL NO. 191 OF 2019

BETWEEN

JOHN MWANZA KENYATTA 1ST APPELLANT

MOHAMMED MUSUNGU ONGOKHO.....2ND APPELLANT

MOSES OLALIE 3RD APPELLANT

AND

KHADIJA KHATIOLI OKUYOYI..... RESPONDENT

(Appeal from the Judgment of the Environment and Land Court of Kenya at Kakamega (Matheka, J.) dated 28th February, 2019

in

ELC No. 4 of 2013)

JUDGMENT OF THE COURT

This is a first appeal from the Judgment of the Environment and Land Court (“ELRC”) at Kakamega (Matheka, J.) delivered on 28th February, 2019. **Rule 29** of the **Rules of this Court** mandates us in an appeal like this one to appraise the evidence and to draw inferences of fact – see, for that mandate, the oft-cited case of **Selle v Associated Motor Boat Company Limited [1968] E.A.123** where the following passage appears:

“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 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 demeanor of a witness is inconsistent with the evidence in the case generally.”

In the plaint filed by the respondent (**Khadija Khatioli Okutoyi**) against the appellants (**John Mwanza Kenyatta, Mohammed Musungu Ongokho and Moses Olalie**), it was alleged that the respondent was the proprietor of a parcel of land known as **L.R. No. South Wanga/Ekero/977 (“the suit land”)** and that the appellants had entered into an area forming part of the suit land, erected structures and had disposed of part of the suit land to other persons. It was further alleged that the appellants had let out structures to the public as residences and it was prayed:

“1. An order of eviction against the Defendants and all persons claiming interest of the suit land under the Defendants.

2. Costs of the suit”

There is some confusion in the record of appeal in the way the appellants responded to the claim.

There is on record a **“Defendant’s Defence”** dated 28th November, 2013 filed by **M/S Momanyi, Manyoni & Company Advocates** acting for all the appellants. It was denied in that defence that the respondent was the owner of the suit land; it was denied that the appellants had entered the suit land – it was averred that the respondent had no cause of action against the appellants and the suit should be struck off.

There is on record **“2nd Defendant’s Defence”** drawn by **M/S Nandwa & Company Advocates**. The 2nd defendant (2nd appellant here) denied entering the suit land and stated at paragraphs 5 and 6 of the defence:

“5. In answer to paragraph 8 of the plaint, the 2nd defendant avers that the plaintiff had similar dispute with her neighbours in Mumias SRMCC No. 477 of 2005 which she lost and is creating unnecessary dispute with the 2nd defendant, she is a frivolous and vexatious litigant.

6. The 2nd defendant avers that he is lawfully registered as an absolute proprietor of Land Parcel No. South Wanga/Ekero/1234 which he purchased from Shaban Nyongesa Nanjira which he fully developed and the plaintiff is envious and wants to grab the 2nd defendant’s land.”

The 3rd defendant (the 3rd appellant here) filed a defence and counterclaim through M/S Nandwa & Company Advocates where the respondent’s claim was denied. The 3rd appellant, like the 2nd appellant, took as an issue the case **Mumias SRMCC No. 477 of 2005**, stating that the respondent had lost that suit and was a frivolous and vexatious litigant. At paragraph 6 of the defence the 3rd appellant stated:

“6. The 3rd defendant avers that he is lawfully registered as an absolute proprietor of Land Parcel No. South Wanga/Ekero/2582 which he purchased from Shaban Nyongesa Nanjira which the plaintiff has unlawfully encroached and a counter-claim shall be raised herein.”

In the counter-claim the 3rd appellant stated that he was the registered proprietor of land known as South Wanga/Ekero/2582; that the respondent had trespassed on that land in December, 2012 and had from then denied the 3rd appellant access to that land. He prayed for an order of eviction of the respondent from that parcel of land; a permanent injunction restraining the respondent from trespassing or laying claim to that parcel of land and mesne profits from December, 2012 at the rate of Kshs.50,000 per year.

There is on record at page 135 a Chamber Summons dated 24th October, 2013 where it was prayed that interested parties be enjoined to the suit. There are 16 parties on the heading of that summons named **“Interested Parties”** and the proceedings show that those parties were represented by an advocate, one Momanyi.

When the suit came up for hearing all the parties and their witnesses adopted written statements that had been filed in the case.

The respondent in a rather brief written statement dated 7th January, 2013 stated that she was the registered proprietor of the suit land which had been forcibly invaded by the appellants. She produced a surveyor’s report and copy of title as part of the evidence. In cross-examination it was her evidence that it was her late husband who had bought the suit land from **“Shaban”** in 1972 and that he had transferred it to her and that the suit land measured 2½ acres.

The 1st appellant, John Mwanza Kenyatta, a businessman, testified that his land was **“2581”**; that the respondent was his neighbor, and that he had not encroached on her land. He had a title registered in 2007.

The 2nd appellant, Mohammed Musungu Ongokho, a farmer, testified that he bought parcel **“1234”** and that the respondent was his neighbour with a road separating them.

The 3rd appellant, Moses Olalie, testified that the respondent was his neighbor; that he had bought land from Shaban Nyongesa and the respondent should be evicted from his land. He further stated that he bought his land which was a sub-division of **“2152 not 977”**.

It is not clear from the record which party called Nyongesa Shaban as a witness in the case. He testified that he sold the suit land to the respondent’s husband in 1972 and:

“.... I sold him 1 acre not 2 acres. She was to get 1 acre only.”

Further, that the original land was parcel No. South Wanga/Ekero/699 which he had subdivided into two – South/Wanga/Ekero/976 and the suit land. He had sold parcel No. 976 to many people.

Then there was evidence by one **Tobias Majoni Wanzala**, a teacher, but he does not appear as one of the persons brought into the suit as interested parties. He testified that he owned a parcel of land South Wanga/Ekero/2153; that the appellants and interested parties were his neighbours who had bought land from Shaban Nyongesa.

After hearing the parties and taking submissions, the Judge found that the title to the suit land was unimpeachable. She nullified title Nos. South Wanga/Ekero/1234, 1235, 1236, 2581, 1281 and 1282, ordering that:

“The defendants and all persons claiming interest of the suit land namely; Land Parcel No. South Wanga/Ekero 977 as per the existing boundaries are given 12 (twelve) months to vacate the said suit land and in default eviction order to issue forthwith.

For the above reasons I find that the counterclaim has not been established and I dismiss it. As the parties are neighbours there will be no order as to costs.”

Those are the orders that provoked this appeal which is premised on a Memorandum of Appeal drawn for the appellants by their lawyers, M/S Emily & Associates Advocates, where 15 grounds of appeal are taken. The grounds of appeal may be summarized as: that the Judge erred in law and fact for ordering cancellation of the appellants’ titles without proof that they had been obtained fraudulently; that the Judge should have upheld and protected the appellants’ titles; that the Judge erred by disregarding evidence of Shaban Nyongesa; that the Judge misunderstood a surveyor’s report; that no reasons were given by the Judge for nullifying the appellants’ titles. It is stated in ground 8 and 12 of the Memorandum of Appeal:

“8. The Learned Judge erred in law and in fact in making a finding based on a speculation to the effect that DW4 had sold Land Parcel No. South Wanga/Ekero/977 twice when there was contrary evidence from DW4 and which was supported by PEx3 to the effect that the subdivisions emanated from Land Parcel No. South Wanga/Ekero/976 and not Land Parcel No. South Wanga/Ekero/977.

9.

10.

11.

12. The Learned Judge erred in law and in fact when she failed to address her mind to the real issues in dispute and further failed to give a reasoned judgment to such issues by merely glossing over the dispute and rendering a judgment that did not meet the seriousness of the dispute.”

It is stated in the penultimate ground that the Judge failed to address her mind to the real issues in dispute and failed to give a reasoned Judgment to those issues, and, finally, it is said that the Judge reached wrong conclusions in the case.

When the appeal came up for hearing before us on 24th June, 2020 through Virtual Platform **“Go-to-Meeting”** due to the prevailing global COVID-19 pandemic, both sides had filed written submissions which counsel for the appellants chose to highlight through oral submissions. We allowed this to happen in the absence of counsel for the respondent after being satisfied that counsel for the respondent had been duly served with a hearing notice for the day.

Miss Emily Kadenyi for the appellants submitted that the Judge had erred in making the orders as the case made by the respondent was a boundary dispute and the Judge should have confined herself to the pleadings. According to counsel, in the absence of a Registry Map and other documents to show siting of the suit land on the ground the Judge could not make the orders she made. Counsel further submitted that the titles in the names of the appellants could not be ordered cancelled under the Land Registered Act in the absence of fraud or a finding that there was a corrupt act in obtaining the same. According to counsel the Judge erred in not examining which titles were first in time.

In written submissions dated 12th June, 2020 the respondent submitted that titles held by the appellants were not good titles and the Judge was right in ordering their cancellation. It was further submitted that the Judge had not departed from the pleadings.

We have considered the record, the submissions made and the law and this is how we resolve the issues in the appeal.

As we have already seen it was prayed in the plaint that the appellants be evicted from the suit land. In the course of the proceedings various other parties (interested parties) were introduced into the suit but there is no indication on record whether they were served to appear in the suit or whether they were given time to file any defence to the suit. There is no defence on record filed by the interested parties.

The Judge reached the conclusion that the respondent’s title was a good title and in the event ordered cancellation of titles held by the appellants and other parties.

A perusal of the record shows various titles produced before the Judge at the hearing:

i) Title No. S/Wanga/Ekero/2582 in the name of Moses Mukanda Olalie (the 3rd appellant) issued by Land Registrar on 24th September, 2007 (measuring 0.05 ha)

ii) Title No. S/Wanga/Ekero/977 in the name of the respondent issued by the Registrar on 6th March, 2009 (measuring 1.0 ha)

iii) Title No. S/Wanga/Ekero/2581 in the name of Johnson J. Rupia Mwanza issued on 7th January, 2008 (measuring 0.06 ha).

iv) Title No. S/Wanga/Ekero/1234 in the name of Mohammed Musungu Ongokho (the 2nd appellant) issued on 18th May, 1990 (measuring 0.07 ha).

It will be recalled that the witness called as “DW4” – Nyongesa Shaban, testified that he sold the suit land to the respondent’s husband and that he sold to him 1 acre and that he retained the parcel S/Wanga/Ekero/976 which he sold to many people, presumably the appellants and the interested parties.

A surveyor’s report which was not signed was produced by the respondent as part of the evidence but the surveyor who prepared the report was not called to testify.

The appellants have taken as an issue in this appeal that the Judge departed from the pleadings and made orders which departed from the pleadings. This complaint is valid. The respondent prayed in the plaint that the appellants be evicted from the suit land but the Judge ordered that various titles be cancelled. Some of those titles belonged to persons who were not parties in the suit. As correctly submitted by counsel for the appellants, a court is not entitled to determine issues that have not been placed before the court for determination; the exception being that a court may base a decision on an unpleaded issue where it appears that the issue has been left to the court for decision – **Odd Jobs v Mubia [1974] E.A. 476.**

It was held by this Court in the case of **Galaxy Paints Company Limited v Falcon Grounds Limited [2000] E.A. 885:**

“The issue of determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of O.XX rule 4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court’s determination.”

The Judge in the case subject of this appeal made heavy weather of **Section 26(1) of the Land Registration Act** holding that the respondent’s title was good and unimpeachable. She made no finding on the evidence by Shaban Nyongesa who testified that he had sold to the respondent’s husband 1 acre of land, not 2 or 2½ acres. Title to the suit land (S/Wanga/Ekero/977 measured 1 hectare which translates to 2.471 acres. The Judge did not comment on the discrepancy on acreage given by Shaban Nyongesa and the acreage at the suit land.

As we have shown, there were titles in favour of the appellants and other parties who were not parties in the suit and the respondent did not lead any evidence to show that those titles were not good titles or that they had been obtained through fraud or through a corrupt scheme.

The 3rd appellant had made counter-claim asking that the respondent be evicted from his parcel of land, amongst other prayers. With due respect to the Judge, there is no reasoning in the Judgement to lead to the conclusion that the counter-claim ought to have been dismissed.

Our evaluation of the whole case leads us to the conclusion that the appellants did not receive a fair hearing in the case. Their titles were ordered cancelled, which order departed from the pleadings. Titles of persons not parties to the suit were ordered cancelled when such parties were not parties in the suit. The Judge did not even examine which title(s) came first in time, something she was required to do.

The proper order in this appeal is to remit the case for a hearing afresh. The appeal is therefore partly allowed to the extent that we set aside the Judgment delivered on 28th February, 2019. The case will be heard afresh by a Judge other than N.A. Matheka, J. Let each party bear their own costs.

Dated and delivered at Nairobi this 23rd day of October, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR