IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & ODEK, JJA)

CIVIL APPEAL NO. 152 of 2012

BETWEEN

PME.....1ST APPELLANT

MRS. KE.....2ND APPELLANT

AND

PNE.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Khamoni , J.) dated 16th October 2009

in

High Court Civil Case No. 667 of 2000)

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JUDGMENT OF THE COURT

1. The appellants are husband and wife. At all material times in the suit, the 1st appellant was the owner of a portion of the parcel of land known as Tigoni LR No. 6**** on which the appellants had established their home. The respondent is the divorced wife of the 1st appellant.

2. On 3rd May 1997, it is alleged that the respondent entered Tigoni LR NO. 6**** and evicted the appellants from their home and converted the appellants house-hold items to her own use.

3. By a Plaint dated 25th April 2000, the appellants filed suit against the respondent claiming special damages of Ksh. 8,132,494/= being the value of personal effects and household goods illegally converted to the use of the respondent. The appellants further sought an order to compel the respondent to give back vacant possession of the suit property and to surrender the appellant's household items. A declaration was sought that the respondent had committed trespass to both the land and chattels. The appellants prayed for mesne profits of Ksh. 100,000/= per month from 3rd May 1997 to the date of delivery of the household items and the appellants portion of the suit property.

4. In a statement of defence filed on 12th March 2001, the respondent denied the appellants were living on the suit property and carrying out any farming activities thereon. In the alternative, it was averred that if the appellants were living on the suit property, they were trespassers and the respondent claimed damages and mesne profits.

5. The respondent asserted that she lawfully entered her "Portion B" of the suit property on 3rd May 1997 and lawfully removed the appellants therefrom using no more force than was necessary to obtain entry and drive out the appellants who were trespassers on "Portion B" of LR No. 6****. The respondent denied converting any household goods of the appellants and also denied that at any material time the appellants were owners of "Portion B" of the suit property. Further, the respondent denied that the appellants had suffered any loss or damage as claimed.

6. Upon hearing the parties, on 16th October 2019, the trial judge dismissed the appellant's suit and ordered each party to bear its own costs. In dismissing the suit, the trial judge at page 15 et seq. of the judgment expressed himself as follows:

"…By virtue of the fact that the defendant was his wife, it cannot be denied that she had an equitable interest in the land before and

after their divorce following Judge Bosire's judgment dated 27th September 1990 in Divorce Cause No. 55 of 1987. The defendant's equitable interest was enhanced by the judgment of Shields J. in Civil Case No. 4684 of 1987 delivered on 27th October 1993 and later replaced by the Court of Appeal's Judgment dated 2nd February 2007 in that Court's Civil Appeal No.75 of 2001… Thus the legal effect of the judgments whether the defendant was still given half the land or her acreage had been reduced to ¼ share meaning 25 acres, was that each one of the two parties held in the disputed land what is known as undivided share and in equity common owners of undivided shares of ¾ to ¼ following the judgment of the Court of Appeal.

That means that with the exception of "where the farmhouse and out buildings stand" including the "matrimonial home" all of which can easily be seen where they stand, the rest cannot be pin pointed unless and until the relevant sub-divisional survey is lawfully done and the ¾ share portion is officially and lawfully separated from the ¼ share portion by a lawful boundary between them and that sub-division is lawfully registered under the Statute governing the sub-divided title…. The plaintiff and defendant having failed to execute the said judgment of the Court of Appeal, a claim based on trespass as brought in this suit cannot stand because in a situation of undivided shares in a piece of land, who is trespassing upon another's land among co-owners of the same land? It does not matter the shares are not equal. Each co-owner is everywhere in the land….. The suit before me should not have been left to proceed after the Court of Appeal's judgment dated 2nd February 2007."

7. Aggrieved by the dismissal of the suit, the appellants have lodged the instant appeal citing several grounds of appeal which can be compressed as follows:

(i) The judge misunderstood wholly the nature of the case before him and the essence of equitable ownership of land.

(ii) The judge erred in not applying the rule in ***Bull -v- Bull [1955] 1 QB 234.***

(iii) The judge misunderstood the doctrine of res judicata, ***Section 34 of the Civil Procedure Act*** *and its application in* ***Nairobi HCCC No. 663 of 2007, Priscilla Njeri Echaria -v- Peter Mburu Echaria.***

(iv) The judge erred in holding that the issues before him were the same issues that had been adjudicated upon by Justice Shields on 27th October 1993, and by the Court of Appeal in ***Civil Appeal No. 75 of 2001, Peter Mburu Echaria -v- Priscilla Njeri Echaria*** *on 2nd February 2007.*

(v) The judge was biased, he did not discharge his constitutional duty to adjudicate on the dispute; he erred in criticizing the appellants, the respondents and their counsel and gravely erred in denying the appellants a fair hearing.

8. In their memorandum of appeal, the appellants pray for an order setting aside the judgment of the trial court dated 13th October 2009. The appellants have urged this Court to award the sum of Ksh. 32,983,294/= as damages against the respondent. In the alternative, it is prayed that the suit be remitted back to the High Court for retrial.

9. At the hearing of this appeal, learned counsel ***Mr. K. N. Munyori*** appeared for the appellants while learned counsel ***Mr. Mwaura F. Shairi*** appeared for the respondents. Both counsel filed written submissions and list of authorities.

10. The appellants' counsel submitted that the trial judge erred in finding that the suit was barred by *res judicata.* From the appellants' view point, the suit was brought to enforce appellants' rights after the respondent invaded their home on 3rd May 1997; that the issue of respondent's invasion of the appellant's home was never an issue for adjudication in the cases referred to by the trial judge and as such *res judicata* is inapplicable. Counsel submitted that the trial judge erred in law in deciding the case based on issues which the court itself framed and which issues were never pleaded by either party; that no party pleaded *res judicata*; that ***Section 34*** of the **Civil Procedure Act** which the trial judge cited had no relevance and application to the suit before the court; that the events complained of took place on 3rd May 1997, well after the suit that led to the Court of Appeal judgment of 2nd February 2007 had been filed; and that the order and judgment of Justice Shields is dated 27th October 1993, well before 3rd May 1997 when the respondent invaded the appellant's house. It was submitted that the trespass committed in 1997 could not be included in proceedings which were concluded in 1993; and consequently, there was no remedy which the appellants could have obtained even if they executed the 1993 decree.

11. The appellant further submitted that the trial judge erred and misunderstood the Court of Appeal decision in **Civil Appeal NO. 75 of 2001, Echaria vs. Echaria.** That the judge severally stated that *"The Court of Appeal….shared out in the ratio of three quarters to one quarter in favour of the 1st Plaintiff against the 1st Defendant."* The relevant excerpts of the Court of Appeal Decree are as follows:

1) …..…

2) ……The order of Shields J. dated 27th October 1993 and all subsequent and consequential orders thereto be and are hereby set aside.

3) There be substituted thereof a declaration that the appellant and the respondent hold beneficial interest in Tigoni LR. No. 6893 in the proportion of three quarters (3/4) and one quarter (1/4) respectively.

4) Tigoni LR No. 6893 be sub-divided and the appellant do transfer 25 acres to the respondent.

5) The respondent's share be demarcated on the portion of the farm where the farm house and outer buildings stand and shall include the matrimonial home and access to it. (Emphasis supplied)

12. Based on the orders of the Court of Appeal in Civil Appeal No. 75 of 2001, it was submitted that since the whole farm was 118 acres, the 1st appellant got 93 acres and by the respondent invading the appellants home, trespass to land had been committed. Further, counsel submitted that the trial judge erred in failing to appreciate that the appellants claim included conversion and trespass to chattels.

13. On the issue of co-ownership, it was submitted that no co-owner has the right to evict another co-owner. Citing dictum from **Bull -v- Bull [1955] 1WB 234,** it was submitted that each co-owner is entitled to possession of the land and to enjoy it; that no co-owner can turn out the other and in the event of one doing so, the other can bring actions for account and trespass. Counsel submitted that the appellants' claim for *mesne* profits is akin to an action for account in trespass; that since 3rd May 1997 when the appellants were evicted from the suit property, the respondent has not accounted for the sale of tea from the suit land; it was submitted that upon eviction by the respondent, the appellants moved and lived in a rented house within Kentmere Club and paid rent to the tune of Ksh. 775,000/=. The appellants claim refund of the sum of Ksh. 775,000/= as special damages.

14. Founded on the foregoing submissions, the appellant urged that the trial court erred in failing to award damages for trespass and refund of the rent paid. Counsel cited dicta from **Kenya Hotel Properties Limited -v- Willesden (2009) KLR 126** and **Kieti -v- Official Receiver [2010] KLR**

96 as well as the persuasive Uganda High Court case of **Kuehne and Nagel Limited -v- Forward International Limited [2011] 1 EA 252.** The principle in all these cases is that a claim in trespass or detinue lies at the suit of the person who has an immediate right to possession of the goods against another who is in actual possession of them and who, upon proper demand fails or refuses to deliver them up without lawful excuse.

15. The appellants further faulted the trial judge for not appreciating that the appellants were evicted from the suit property on 3rd May 1997; that upon eviction, the appellants lived in a cottage at Kentmere Club and were entitled to refund of rent paid; that as a result of the eviction, the appellants did not grow tea on the 118-acre farm; and that it was the respondent who benefitted from the entire 118-acre farm which yielded income from tea growing. That all these events occurred after the judgment by Shield J. and the Court of Appeal and were not covered by the doctrine of *res judicata*.

16. Counsel for the respondent in opposing the appeal submitted that the trial judge did not *suo motu* raise the issue of *res judicata*, that the same was raised by counsel for the respondent in his submission; that *res judicata* is a point of law which can be raised at any time even by the court on its own motion. Counsel submitted that after **Civil Appeal No. 75 of 2001** was finalized on 2nd February 2007, the appellant's claim in **HCC No. 667 of 2000** which was still pending before the High Court became irrelevant as the judgment in **Civil Appeal No. 75 of 2001** allowed the respondent to continue living on "Portion B" of LR No. 6894 which she had occupied as far back as 1996. It was submitted that **Civil Appeal No. 4684 of 1987** raised the issue of trespass and the same was heard and determined on 5th June 1997; that **Civil Application No. NAI 149 of 1997 (61/97/UR)** dealt with the same issue and was heard and determined in favour of the respondent on 11th July 1997. That pursuant to **Civil Appeal No. 75 of 2001,** the 1st appellant became the owner of 93 acres in LR No. 6893 on 2nd February 2007 when the judgment was delivered. Based on these submissions, the respondent urged us to dismiss the appeal.

17. We have considered the grounds of appeal as well as submissions by counsel and the list of authorities filed in this matter. This is a first appeal and it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In **Selle -vs- Associated Motor Boat Co. [1968] EA 123,** it was expressed:

> **"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 demeanor 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)."**

18. In our considered view, the core issue in this appeal is to isolate and determine the *ratio decidendi* for the decision of the trial judge. All the grounds urged in appeal reflect a misapprehension of the *ratio decidendi* of the judgment of the trial court. The *ratio decidendi* of the learned judge's decision is captured in the following statement:

> ***"The plaintiff and defendant having failed to execute the said judgment of the Court of Appeal, a claim based on trespass as brought in this suit cannot stand because in a situation of undivided shares in a piece of land, who is trespassing upon another's land among co-owners of the same land? It does not matter the shares are not equal. Each co-owner is everywhere in the land….. The suit before me should not have been left to proceed after the Court of Appeal's judgment dated 2nd February 2007."***

19. The trial judge in making the above statement was referring to the Court of Appeal judgment delivered on 2nd February 2007 in **Civil Appeal No. 75 of 2001, Echaria -v- Echaria.** In the opinion of the learned judge, the right of the 1st appellant and the respondent to the suit property was determined by the Court of Appeal's judgment. At the risk of repetition, the Decree in the Court of Appeal Civil Appeal No. 75 of 2001 was to the effect that the 1st appellant and the respondent in this appeal shall hold beneficial interest in Tigoni LR. No. 6**** in the proportion of three quarters (3/4) in favour of the 1st appellant and one quarter (1/4) in favour of the respondent. The Court ordered that Tigoni LR No. 6**** be sub-divided and the 1st appellant do transfer 25 acres to the respondent herein.

20. The record in this appeal and the evidence before the trial court reveal that the 1st appellant and the respondent had not sub-divided the suit property as decreed in the judgment of this Court delivered on 2nd February 2007. It is for this reason that the trial judge invoked the

principle of co-ownership of the suit property between the 1st appellant and the respondent. In adopting co-ownership, the trial court expressed that "*a claim based on trespass cannot stand in a situation where the co-owners have an undivided share in the piece of land because each co-owner is everywhere in the land*."

21. In challenging this statement, the appellant cited the decision in ***Bull vs. Bull*** (supra) where Lord Denning stated that:

> ***"Each co-owner is entitled to possession of the land and enjoy it; that no co-owner can turn out the other and in the event of one doing so, the other can bring an action for account and trespass."***

22. It is the appellant's contention that based on Lord Denning's dictum in ***Bull vs. Bul*l** (supra), the trial court erred in failing to appreciate that even if the 1st appellant and the respondent were co-owners, the respondent had no right to evict the 1st appellant from the suit property. That by forcefully entering and evicting the appellant from the suit property on 3rd May 1997, the respondent as a co-owner was liable to the 1st appellant for unlawful eviction, trespass to the entire suit property and damages for conversion of the 1st appellant's house hold goods. It is in this context that the appellant submits that the trial court erred in law and further erred in failing to find that having unlawfully evicted a co-owner from the suit property, the respondent was liable to refund the 1st appellant all the expenses he undertook in the form of paying rent at Kentmere Club for his accommodation; and that it is in this same context that the respondent should account for all income and mesne profit arising from the respondent's exclusive use, occupation and possession of the entire suit property to the exclusion of the 1st respondent as a co-owner.

23. The respondent, in opposing the appellants' contestations, submitted that the issue of trespass was resolved vide Civil Appeal No. 4684 of 1987 determined on 5th June 1997 and Civil Application No. NAI 149 of 1997 (61/97/UR) determined in favour of the respondent on 11th July 1997.

Conversely, the appellants contend that eviction and the cause of action in this matter arose on 3rd May 1997 and the two suits referred to above had been filed and as such, the trial court could not and did not consider and determine the eviction that took place on 3rd May 1997.

24. We have considered the rival submissions by the parties. It is not in dispute that the Judgment of this Court in **Civil Appeal No. 75 of 2001** determined the share of the 1st appellant and the respondent in the suit property. It is also not in dispute that at the time of trial, the suit property had not been sub-divided as decreed by this Court on 2nd February 2007. It is this failure by the 1st appellant and respondent to sub-divide the suit land that has given rise to co-ownership of the property. If the parties had sub-divided the land, the boundaries and portion of each party would be ascertainable, identifiable and demarcated with beacons.

25. In this appeal, the 1st appellant and the respondent as co-owners of the suit property are tenants in common. Each has a defined beneficial interest in the suit property – 93 acres for the 1st appellant and 25 acres for the respondent. As tenants in common, the 1st appellant and the respondent hold divisible interest in the suit property which can be disposed of or otherwise dealt with separately from the share of the other co-owner. A co-owner is entitled to three essentials of ownership namely: the right to possession, the right to use and the right to dispose of his share. If a co-owner is deprived of his property, he has a right to be put back in possession.

26. In our considered view, where there are two tenants in common one co-owner cannot, as a general rule maintain an action of trespass against the other, but can do so only if the act complained of amounts to either an actual ouster or to a destruction of the subject matter of the tenancy. Likewise, one co-owner in sole occupation cannot be made to pay rent to another co-owner unless he /she has excluded or ousted the other from possession. (See **Cheshire and Burn's, Modern Law of Real Property, 16th Edition, Butterworth's at page 243 and 250).**

27. At common law, one joint owner is not entitled to an occupation rent from the other. However, where one party has excluded the other from the property equity requires that the excluded party receive an occupation rent (see generally **Dennis -v- McDonald [1981] 1 WLR 810**).

28. In the instant case, the 1st appellant's contention is that he was excluded from possession and occupation of the suit property; that the respondent obtained exclusive occupation, use and control of the entire suit property from 3rd May 1997. Conversely, the respondent contends that she only took lawful possession of "Portion B" of the suit property and which portion is the part that the Judgment of this Court in Civil Appeal No. 75 of 2001 had decreed to belong to her.

29. The trial judge in considering these rival contestations expressed himself thus:

> ***"The defendant in her defence is relying on "Portion A" and "Portion B" which are not official according to the evidence before me. I cannot understand why parties in this suit have failed to go for the sub-division and transfer of the suit piece of land as ordered by the Court of Appeal and advised in a subsequent High Court ruling by Justice Osiemo aforesaid. It is the parties' themselves to do that sub-division and transfer in execution of the judgment of the Court of Appeal aforesaid. ….***
>
> ***The defendant who talks of Portion A and Portion B as divisions of the suit piece of land, assert that while the 1st Plaintiff owned Portion A, she the defendant owned portion B and lawfully lived and carried on business of farming and that the plaintiffs were trespassers on Portion B if they did live and carry on farming on portion B. She therefore says that on 3rd May 1997, she lawfully entered Portion B and lawfully removed the plaintiffs therefrom using no more force than was necessary to obtain entry and drive out the plaintiffs*** *who were trespassers on Portion B."*

30. During trial, the appellant ***PME*** (PW1) testified that on 3rd May 1997 he was playing golf at the Limuru County Club when he received a

call from the 2nd appellant that the respondent had raided their house leading a group of uniformed people; that he later drove alone to the house where he stood outside and saw the respondent coming from inside; that the respondent told him that the house was hers but he was welcome back to the house alone.

31. On her part, the respondent ***PNE*** (DW1) testified that on 3rd May 1997, she moved back to her matrimonial home accompanied by 20 body guards with instructions to only defend (protect) her and not to allow anybody to enter the home without her permission; that she knew the appellants were using her matrimonial home and were refusing to move out yet it was her home. She testified that whether or not she had an eviction order, the issue had been dealt with by the Court of Appeal; that she did not deprive the appellants their home, she only took possession of her matrimonial home; and that she removed all the goods that were in the house, packed them and sent them to the appellants.

32. We have analyzed the evidence on record particularly the testimonies of PW1 and DW1. What comes out in evidence is that during the subsistence of marriage between PW1 and DW1, their matrimonial home was the same home in which the appellants were staying. The Court of Appeal in Civil Appeal No. 75 of 2001 had given the respondent ownership of the matrimonial home which was to be part of the 25 acres decreed in favour of the respondent. The evidence reveals that on 3rd May 1997, the respondent moved in and took exclusive possession of the matrimonial home.

33. In our considered view, the 1st appellant and the respondent are co-owners of the suit property. This Court had assigned each a specific acreage, to the 1st appellant 93 acres and to the respondent 23 acres. Though the suit land had not been sub-divided, the judgment by this Court delivered on 2nd February 2001 was very specific and clear that the respondent's portion was to include the farm house and matrimonial home and access thereto. The legal and practical effect of the decree is that ownership of the farm house and matrimonial home was vested upon the respondent. In our view, from 2nd February 2007, the respondent was entitled to exclusive use and possession of matrimonial property. Whereas we do not condone self-help, we find that the entry by the respondent into the matrimonial home was not trespass. The respondent through self-help took possession of the matrimonial home which had been decreed by this Court as her exclusive property. Prior to 2nd February 2007, the 1st appellant and the respondent were co-owners each entitled to use, occupation and enjoyment of the entire suit property in an un-divided and un-demarcated share.

34. As regards trespass to chattels, we have analyzed the evidence on record. On one hand, the 1st appellant contends the respondent took possession of his household goods. On the other, the respondent testified she packed the goods that she found in the house and sent them to the appellants; and that when she left her matrimonial home she left behind many goods which were sold by the 1st appellant.

35. In **David Bagine vs. Martin Bundi, Civil Appeal No. 283 of 1996**, this Court expressed that:

> **"Special damages in addition to being pleaded must be proved; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, this is what I have lost. I ask you to give me these damages…"**

36. Upon our consideration of the evidence on record relating to the moveable items, it is our considered view that both the 1st appellant and the respondent claim as against each other conversion and trespass to each other's moveable property. The respondent testified that she returned goods that did not belong to her to the appellants; she contends that the list of items alleged to have been in the house is not accurate. The respondent testified that some of the goods that were in the matrimonial house belonged to her. The evidence does not establish as between the 1st appellant and the respondent who owned what goods. On balance of probability, each party failed to prove and disprove liability on the part of the other. Accordingly, we are satisfied that liability for the claim for general and special damages as well as mesne for trespass to goods was not proved.

37. On the issue of *res judicata*, the appellant contends that the trial judge erred in *suo motu* raising *res judicata.* Conversely, the respondent avers that *res judicata* is a point of law that can be raised any time including being raised *suo motu* by the trial judge. The trial court in its judgment stated as follows:

> **"It appears to me that what is being claimed in this suit before me ought to have been claimed in this Court's Civil Case No. 4684 of 1987 which was decided by Shields J and thereafter went to the Court of Appeal as Civil Appeal No. 75 of 2001 resulting in that Court's judgment dated 2nd February 2007. That being the position, although the issue of res judicata has not been raised before me, does evidence before me reveal a good reason why this suit should not be taken to be res judicata? In my view, no good reason is revealed from that evidence."**

38. We have considered the above statement by the trial court and considered it in the context of the *ratio decidendi* of the court's judgment. In our view, what was and is *res judicata* is the Decree of this Court awarding the respondent 25 acres of the suit land including the farm house and the matrimonial home. Although sub-division and demarcation of the 25 acres had not been done, what was clear and *res judicata* is that the respondent was decreed to have exclusive use, possession and ultimate ownership of the farm house, the matrimonial home and access thereto. The alleged eviction of the appellants was from the matrimonial home which property exclusively belong to the respondent. Pursuant to the Decree of this Court in Civil Appeal No. 75 of 2001, we find that there is no co-ownership on the matrimonial home and the farm house. The exclusive ownership and right to possession of the farm house, the matrimonial home and access thereto were already determined in Civil Appeal No. 75 of 2001 and the contestation as to ownership of the Tigoni matrimonial home is *res judicata.* We agree that the cause of action in relation to trespass to goods arose after all the court decisions referred to had been filed. However, as we have found, the appellants did not prove on a balance of probability the claim for conversion and trespass to chattels.

39. On the issue of recovery of rent paid by the 1st appellant for his own accommodation within Kentmere, we are of the view the rent paid is not recoverable from the respondent. The respondent was entitled to exclusive use, possession and occupation of the farm house and the matrimonial home. It was and is the duty of the 1st appellant to move out of the matrimonial home and secure accommodation for himself. The 1st appellant could as well have built a house or home for himself within his 98-acre portion of the suit property or rented a house as he

did. The 1st appellant took the risk to continue occupying the matrimonial home that has exclusively been decreed in favour of the respondent. This was his choice and choices have consequences. The consequences and the loss lie where it falls.

40. On the whole, we have considered all other grounds urged in this appeal. We are unable to find any error in the trial court's judgment. The upshot is that we find this appeal has no merit and is hereby dismissed. Each party to bear his/her costs in this appeal.

Dated and delivered at Nairobi this 8th day of February, 2019

P. N. WAKI

……

JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

…….

JUDGE OF APPEAL

J. OTIENO-ODEK

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR