



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KIAGE & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 38 OF 2018

BETWEEN

KENYA IHENYA COMPANY LTD. .... 1<sup>ST</sup> APPELLANT

MARY MUTHONI NDEGWA ..... 2<sup>ND</sup> APPELLANT

AND

NJERI KIRIBA ..... RESPONDENT

*(An appeal from the Judgment of the Environment and Land Court at Nairobi (K. Bor, J.) dated 14<sup>th</sup> November, 2017*

*in*

*E.L.C No. 205 of 2016.)*

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**JUDGMENT OF THE COURT**

1. The appellants herein have preferred this appeal challenging the decision of the Environment and Land Court (ELC) dated 14<sup>th</sup> November, 2017 wherein several orders were issued in favour of the respondent. As such, our role as the first appellate court is clearly set out under **Rule 29** of the **Court of Appeal Rules**. We are required to re-appraise all the evidence and re-examine the same in a fresh and exhaustive way and arrive at our own independent conclusions.

2. With our mandate in mind, the salient facts were that **Kenya Ihenya Company Ltd.** (the 1<sup>st</sup> appellant), which engages in the business of selling parcels of land, was at the material time disposing of portions of LR No. 3811/5/R1 (original parcel) situated at Githurai to interested purchasers. According to **Njeri Kiriba** (the respondent), she expressed interest in purchasing two plots thereon as early as the year 1973. At the time, the 1<sup>st</sup> appellant's regulations were to the effect that the purchase price for one plot was Kshs.2,100 which was the equivalent of 21 shares in the said company.

3. As a result, she made payments for the said plots in instalments and ultimately, she completed payment for the first plot on 10<sup>th</sup> August, 1980 and then the second one on 5<sup>th</sup> June, 1983. Thereafter, the 1<sup>st</sup> appellant issued her with a Share Certificate No. 895 for her 42 shares. She maintains that she was allotted Plot Nos. 144 & 145 and she took possession.

4. Be that as it may, the 1<sup>st</sup> appellant refused to issue her with ballot papers in respect of the said plots. All her efforts to convince the 1<sup>st</sup> appellant to issue the said ballot papers and facilitate the transfer of the portions in her name fell on deaf ears. She resorted to seeking the assistance of various government offices right from the area Chief, the Provincial Commissioner up to the Ministry of Lands. It appears that some of these offices called upon the 1<sup>st</sup> appellant to shed light on the issue but still no resolution was forthcoming.

5. In the respondent's view, the 1<sup>st</sup> appellant was bent on denying her the plots, which were rightfully allocated to her, using any means. At one point, she was attacked in her house which was on the said plots and physically assaulted; and subsequently, her house was burnt down.

6. It is the foregoing state of affairs that provoked the respondent to file a suit, subject of this appeal, in the ELC against the 1<sup>st</sup> appellant seeking *inter alia*,

***“an injunction against the defendant, his agents or servants from further harassing her or trespassing on the suit parcel.”***

7. In its statement of defence, save for admitting that the respondent had purchased one plot, that is, Plot No. 145 from the original parcel, the 1<sup>st</sup> appellant denied all the other allegations. The version of events given by the 1<sup>st</sup> appellant was that in the year 1985, it resolved to set the purchase price of a plot from the original parcel at Kshs.3,500. The respondent was only able to raise funds for one plot, Plot No.145, which she paid for in instalments until the year 1996.

8. With regard to Plot No. 144, (also described as Nairobi/Block 124/144) (suit land), the 1<sup>st</sup> appellant averred that **Mary Muthoni Ndegwa** (the 2<sup>nd</sup> appellant) was the then current registered owner. She had purchased the suit land from one David M. Thungu who had a valid title. Subsequently, the 2<sup>nd</sup> appellant was issued with a letter of allotment over the said plot and had even made payments towards the preparation of the certificate of title. The 1<sup>st</sup> appellant went on to set out the process by which the 2<sup>nd</sup> appellant obtained the suit land urging that the respondent had no cause of action either against it or the 2<sup>nd</sup> appellant. All in all, the 2<sup>nd</sup> appellant was a bonafide purchaser whose title was unimpeachable.

9. At the trial, the respondent gave evidence reiterating her position as set out in her plaint. On the other hand, the 1<sup>st</sup> appellant called the 2<sup>nd</sup> appellant as its sole witness. In her evidence, the 2<sup>nd</sup> appellant stated that she had purchased the suit land together with Plot No. 143 on 24<sup>th</sup> June, 1997 from one David M. Thungu who had previously purchased the same from Christopher K. Saina way back on 7<sup>th</sup> October, 1987. In all those transactions, the 1<sup>st</sup> appellant had given the green light.

10. After meeting the requisite transfer fees, she was issued with a ballot paper in respect of the suit land and a share Certificate No. 895 for 30 shares on 19<sup>th</sup> September, 1997 by the 1<sup>st</sup> appellant. She further testified that she also paid the requisite fees to the Ministry of Lands on 29<sup>th</sup> July, 2015 for purposes of processing of the certificate of title. The 2<sup>nd</sup> appellant also claimed to have served the respondent with notices to vacate the suit land on 24<sup>th</sup> December, 1998 and 26<sup>th</sup> July, 1999. She maintained that she was the legal proprietor of the suit land and not the respondent.

11. Faced with the aforementioned competing versions, the trial court (K. Bor, J.) believed the respondent and in a judgment dated 14<sup>th</sup> November, 2017 expressed:

***“The court finds that the Plaintiff has proved on a balance of probabilities that she bought two plots from the Defendant being plot numbers 144 and 145 situated in Githurai. She paid survey fees for the two plots in 1982 and 1983 and was in occupation until she was attacked and forced to flee from the suit land.***

***The court grants prayer (a) of the Plaint dated 27/10/2015. The Defendant or any person claiming under them is restrained from further harassing the Plaintiff on plot number 144. The Plaintiff, a senior citizen of 93 years acted in person in these proceedings and drafted the pleadings. Article 159 of the Constitution enjoins the court to administer justice without paying undue regard to technicalities.***

***The Defendant is hereby directed to execute the transfer documents that will facilitate the registration of the Plaintiff as the proprietor of plot numbers Nairobi Block 124/144 and 145 within 21 days of this judgement failing which the Deputy Registrar of the Environment and Land Court at Milimani will execute the documents.”***

12. It is the foregoing decision, as we stated in the opening paragraph of this judgment, which led to this appeal which is premised on 12 grounds. Basically, the appellants complain that the learned Judge erred by-

***i. Misapprehending that the 2<sup>nd</sup> appellant was a bonafide purchaser of the suit land hence the 1<sup>st</sup> appellant could not deal with the same as directed by the court.***

***ii. Granting prayers which had not been sought in the pleadings.***

***iii. Disregarding the overwhelming evidence which clearly demonstrated that the respondent was only allocated Plot 145.***

***iv. Finding that there was double allocation of the suit land.***

***v. Failing to find that the respondent’s claim over the suit property was time barred.***

***vi. Failing to appreciate that the respondent could not lodge a competent suit with regard to the suit land without joining the 2<sup>nd</sup> appellant as a party to the suit.***

13. At the hearing of the appeal, learned counsel, Mr. Mwara who appeared for the appellants relied entirely on the written submissions filed on behalf of the appellants and opted not to make any oral highlights. There was no representation for the respondent but nonetheless, written submissions had equally been filed on her behalf which we shall take into consideration.

14. The appellants argued that it is settled that detrimental orders should not be issued against a person who is not a party to the suit in question. Following the transfer of the suit land to the 2<sup>nd</sup> appellant, any legal right or control the 1<sup>st</sup> appellant had over the land was extinguished. Therefore, the learned Judge erred in issuing orders which adversely affected the 2<sup>nd</sup> appellant’s rights over the suit land yet she was not a party to the suit.

15. The appellants claimed that all along the respondent was aware that the 2<sup>nd</sup> appellant had purchased the suit land but chose not to join her in the suit. All the same, the 2<sup>nd</sup> appellant had sought to be enjoined in the suit and made an application to that effect which was opposed by the respondent. However, as per the appellants, the High Court advised that she should remain as the 1<sup>st</sup> appellant's witness since the 1<sup>st</sup> appellant had put forth her claim to the suit land as its defence.

16. It was asserted that the orders issued by the learned Judge had not been sought by the respondent in her pleadings. Moreover, it was wrong for the learned Judge to direct the transfer of the suit land which legally belongs to the 2<sup>nd</sup> appellant to the respondent.

17. The appellants submitted that the respondent's claim to the suit land was statute barred having been brought after the lapse of 12 years from when her cause of action, if any, arose. Elaborating further, it was contended that the respondent was informed way back on 24<sup>th</sup> December, 1998 that the 2<sup>nd</sup> respondent was the bonafide purchaser of the suit land when she was served with a notice to vacate the same; hence time begun running from that date and lapsed on or about 24<sup>th</sup> December, 2010.

18. Asserting that the learned Judge had no basis for interrogating the propriety or otherwise of the 2<sup>nd</sup> appellant's title, the appellants relied on the case of Samuel Murimi Karanja & 2 others vs. Republic [2003] eKLR and in particular, the following sentiments of the High Court:-

***“The issue of land ownership is volatile, it is for this reason that holders of valid titles to land must be protected by the law, the government and this court. The Court of appeal of Kenya has occasionally dealt with this point and therefore once the court is faced with the claim of a valid title issued by the government, it has no obligation to inquire into the reasons or manner in which the title was obtained, unless of course there is clear evidence of fraud against the holder of the title. Courts must shy away from usurping the authority of the grantor or right to question title deeds issued by the President, except in clear cases of fraud or where the title was not issued in accordance with the Governing Act. This strict observance of the property rights of a title holder is necessary to ensure certainty in transactions regarding land.”***

In any event, the evidence as a whole proved that the 2<sup>nd</sup> appellant was a bonafide purchaser of the suit land and was not party to any acts of fraud or impropriety.

19. On her part, the respondent submitted that the trial court's judgment was proper in law and beyond reproach. She stated that it was only after she started following up on the title to the suit land that the 2<sup>nd</sup> appellant emerged with her false claim. The evidence was clear that she had purchased two plots from the 1<sup>st</sup> appellant and paid the survey fees for both; and one of those plots is the suit land. She urged the Court to dismiss the appeal.

20. We have considered the record, submissions made on behalf of the parties and the law. It is not in dispute that what was before the learned Judge was a dispute revolving around competing interests over the suit land. As a result, the learned Judge was bound to look into the basis of each claim and could not simply dismiss the respondent's claim on the ground that the suit land was registered in the 2<sup>nd</sup> appellant's favour especially since the respondent had imputed fraudulent conduct on the part of the 1<sup>st</sup> appellant.

21. Having appraised ourselves of the facts and the evidence tendered before the trial court, we see no reason to interfere with the learned Judge's findings. We say so because, firstly, the respondent produced several receipts issued by the 1<sup>st</sup> appellant in respect of the transaction between them. Those receipts corroborated the respondent's version of events, that is, she began paying for the plots as early as 4<sup>th</sup> May, 1973; and she continued making payments until she had finished paying for two plots on diverse dates, that is, on 10<sup>th</sup> August, 1980 and 5<sup>th</sup> June, 1983; thereafter she was issued with a share certificate on 5<sup>th</sup> June, 1983.

22. It is not lost on us that some of the receipts bore an inscription of Plot No. 145. However, contrary to the appellants' contention that they did not prove that the respondent had only paid for the said plot. There were other receipts which were produced, though they did not specifically mention that they were in respect of the suit land, in our view, they established the respondent's case.

23. Secondly, in as much as the appellants maintained that the 2<sup>nd</sup> appellant had derived a clean title from David Mbugua, the appellants' evidence was silent with respect to how Christopher K. Saina (who is alleged to have passed the title to David Mbugua), acquired the suit land let alone whether he had been issued with a share certificate by the 1<sup>st</sup> respondent.

24. Thirdly, it was clear that the 1<sup>st</sup> appellant had allotted the suit land to both the respondent and the 2<sup>nd</sup> appellant hence the learned Judge's conclusion that there was a double allocation. That being the case, since the respondent was first in time, as the evidence is clear that she completed making payments in the year 1983 whilst the 2<sup>nd</sup> appellant claimed to have purchased the same on 24<sup>th</sup> June, 1997, she was the bonafide proprietor. In that regard, the law is succinctly spelt out in M'Ikiara M'Rinkanya and Another vs. Gilbert Kabeere M'Mbijiwe [1982 – 1988] 1 KAR 196 wherein this Court held that:-

***“Where a similar situation as in this case arose, there was a double allocation to a plot issued by the Council of the area. The court had noted that the said first allotted letter to the original plaintiff had never been cancelled. That the council had no power to allocate the same property again without following the laid down procedure of re-allocating the property.”***

25. Having expressed ourselves as herein above, the next issue that falls for our consideration is whether the orders issued by the learned Judge were proper. The appellants attacked those orders on two fronts, that is, that they had not been sought by the respondent and they were issued against the 2<sup>nd</sup> appellant who was not a party to the suit.

26. As a general rule a court ought not to make pronouncement on issues not raised in the pleadings filed by parties. See Independent

***Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others*** [2014] eKLR. Nevertheless, a court may base a decision on an unpleaded issue where it appears at the trial that the issue has been left to the court for decision. In the case of ***Odd Jobs vs. Mubia*** [1970] EA 476. Law, J.A (as he then was), at page 478 paragraph 9-11 had this to say:-

***“On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this Court is not as strict as appears to be that of Courts in India. In East Africa the position is that a Court may allow evidence to be called and may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the unpleaded issue has in fact been left to the court for decision...”***

27. In this case, the parties led evidence with respect to the proprietorship of the suit land thus calling upon the trial court to make a determination on the same. Having found and rightly so, that the respondent was the legal proprietor of the suit land, it followed that the learned Judge could not be faulted for directing registration of the same in her favour.

28. As for the issue of the 2<sup>nd</sup> appellant not being a party to the suit, it is trite that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. This much was appreciated by the Supreme Court of India in ***Sangram Singh vs. Election Tribunal, Koteh, AIR 1955 SC 664*** as follows:-

***“[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”***

29. It is not clear from the record what fate the 2<sup>nd</sup> appellant’s application to be joined to the suit suffered. Be that as it may, the 2<sup>nd</sup> appellant cannot claim that she was not heard on her claim taking into account that not only did the 1<sup>st</sup> appellant set out her claim as its main defence but also called her to give evidence as its only witness. Consequently, we find that she was not condemned unheard but was given an opportunity to present her case.

30. Last but not least, ***Section 7*** of the ***Limitation of Actions Act*** provides that:

***“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”***

We doubt that the respondent’s cause of action accrued in the year 1998 as alluded to by the appellants. First, during cross examination the respondent categorically denied being served with notices to vacate the suit land by the 2<sup>nd</sup> appellant or her advocate. She was also consistent that she was not aware of the 2<sup>nd</sup> appellant’s claim when she filed her suit. Second, it is not in dispute that the respondent filed the suit in question after she was attacked and her house was burnt down which is way after the 2<sup>nd</sup> appellant alleges to have purchased the suit land. In the circumstances, we find the appellants’ assertion that the suit was time barred lacks merit.

31. Consequently, we find that the appeal lacks merit and is hereby dismissed with costs.

**Dated and delivered at Nairobi this 10<sup>th</sup> day of May, 2019.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

**DEPUTY REGISTRAR**