



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: GITHINJI, SICHALE & KANTAL, J.J.A.)

CIVIL APPEAL NO. 93 OF 2016

BETWEEN

FRESHIA WAMBUI MUIRURI.....APPELLANT

AND

WILLIE KIRITU KIGOTHO.....RESPONDENT

(An Appeal from the Judgment of the Environment and Land Court of Kenya

at Nakuru (Waithaka, J.) dated 19th September, 2014

in

E.L.C. No. 29 of 2013)

JUDGMENT OF THE COURT

In an Originating Summons filed at the High Court of Kenya, Nakuru, the appellant, **Freshia Wambui Muiruri** asked the High Court to determine various questions. These included the question whether she was entitled by adverse possession to three (3) hectares of land from the parcel of land known as **Title Number Njoro/Njoro Block 1/237 (Kikapu)**, registered in the name of the respondent, **Willie Kiritu Kigotho**. Further questions for determination included whether the appellant was entitled under **Section 38 (1) and (2)** of the **Limitations of Actions Act** to be registered as the absolute proprietor of the said land and whether the respondent should transfer the parcel of land to her. Also whether in default of the respondent transferring the land to her, the Deputy Registrar of the High Court should execute all documents for registration of the land in favour of the appellant and also whether she was entitled to other orders and costs. The summons was supported by the appellant's affidavit sworn at Nakuru on 17th August, 2011. She deponed in the affidavit, amongst other things, that she had resided on the land for a period of 39 years; that the respondent had been registered as the proprietor of the land on 8th March, 1991; that the respondent had filed a suit at the High Court for her eviction which suit had been dismissed; that it had been ordered that she continues to occupy the land; and that her occupation of the land where she said she had build a home had been uninterrupted for a period exceeding 12 years. There were various annexures to the affidavit.

The respondent filed a replying affidavit opposing the summons.

When the matter came for hearing before **Waithaka, J.**, it was ordered that it proceed by way of affidavit evidence. This was followed by a judgment which was delivered on 19th September, 2014 where the learned Judge found on the issue of adverse possession:

“I find that in attempting to determine the plaintiff's claim for adverse possession I will again be determining the rights of the applicant over the suit property which I find has already been determined. For that reason I find that the suit is res judicata”.

The learned Judge further found that if she was wrong in her determination that the suit was *res judicata*, the appellant had still failed to prove her claim and the summons was thus dismissed with costs.

The appellant was dissatisfied with those claims and through the firm of **Kagucia & Company Advocates** filed a Memorandum of Appeal where the five (5) grounds are set out. Ground 4 of the Memorandum of Appeal faults the Judge for what is said to be abdication of her duties to resolve the actual issues in controversy between the parties. The last ground faults the Judge for arriving at a decision based on wrong principles.

In view of the position we have taken in this appeal we need not set out or address the other grounds.

When the appeal came up for hearing before us, learned counsel **Mr. J. G. Kagucia** for the appellant and learned counsel **Mr. Lawrence M. Karanja** for the respondent, pointed out to us that they did not wish to canvass the appeal because it was agreed between them that the judgment did not accord with the pleadings or the submissions made before the Judge. Both counsel agreed that the Judge had introduced extraneous matters in the suit before her. It was pointed out that the Judge considered a matter that was before the Chief Magistrate which matter was not before the Judge and there was no reference to such a matter in the pleadings filed at the High Court or the submissions made. Further, that the Judge considered **Chief Magistrate's Case Numbers 923 of 2004 and 2072 of 2003** and also a criminal case whose number was not given all of which were not in the pleadings or submissions. According to both counsel those matters had no relevance to the issues before the Judge. There is also reference in the judgment to a **Land Disputes Tribunal Case No. 12 of 2003** which the Judge considers at page 156 of the record but the lawyers did not address her on those issues at all. It was pointed out to us that the final orders made by the Judge left the parties in a quandary as the appellant's case was dismissed yet the respondent could not evict the appellant. Both counsel asked us to order that the suit be retried at the High Court.

Order 21 Rule 4 of the **Civil Procedure Rules** on:

"*Contents of Judgment*" requires that in defended suits a judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Black's Law Dictionary Ninth Edition edited by **Bryan A. Garner** at page 918 on judgments states:

"A court's final determination of the rights and obligations of the parties in a case".

We have perused the pleadings that were filed before the learned Judge and the submissions. We agree with counsel for both parties that the judgment as written does not accord with the pleadings or submissions made. The Judge referred to cases that were not cited before her and on which the parties made no reference or submissions on. The judgment as written does not accord with **Order 21** of the **Civil Procedure Rules** as it does not address the issues emanating from the pleadings and further as it does not finally determine the rights of the parties. The judgment cannot be allowed to stand. The respondent's counsel properly conceded the appeal to the extent already stated.

In the premises, we set aside the said judgment and in the interest of the justice we order that the case be remitted back to the **Environment and Land Court** to be heard by a Judge other than other Lady Justice L. N. Waithaka.

Costs of appeal will abide the orders of the Environment and Land Court.

Dated and Delivered at Nakuru this 26th day of September, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR