



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 338 OF 2014

BETWEEN

HELLEN TUM.....APPELLANT

AND

JEPKOECH TAPKILI METTO.....1ST RESPONDENT

JOHANNA KIPKEMEI TOO.....2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Eldoret, (Hon. S. Munyao, J.) dated and delivered on 5th day of December, 2012

in

Eldoret E & L C No. 795 OF 2012

(Formerly H.C.C.C 224 OF 2011)

Consolidated with

Eldoret E & L C No. 975 OF 2012)

(Formerly H.C.C.C 44 of 2012)

JUDGMENT OF THE COURT

[1] This is an appeal arising from the judgment of the Environment and Land Court (Sila Munyao J), delivered in two suits that were consolidated. The first suit was ELC No.795 of 2012 filed by the appellant Hellen Tum (herein Hellen) against the 1st respondent Jepkoech Tapkili Metto (herein Jepkoech) and the 2nd respondent Johana Kipkemei Too (herein Johana). The second suit was ELC No.975 of 2012 that was filed by Johana against Hellen. Both suits were originally filed in the High Court of Kenya at Eldoret but were subsequently transferred to the Environment and Land Court where they were consolidated.

[2] The two suits were preceded by an earlier suit, Eldoret HCCC No. 25 of 2005 in which Jepkoech had sued Hellen and 4 others seeking to have them evicted from land parcel known as Nandi/Kilibwoni/1023 (the suit property), on the ground that Hellen was a trespasser as her license to remain on the land had been withdrawn and or revoked. An interlocutory order of injunction was issued pending the hearing and determination of the suit. That suit is apparently still pending. In the meantime Jepkoech transferred the suit land to Johana hence the suit filed by Hellen against Johana.

[3] In her suit Hellen claimed that she is a “wife” to Jepkoech under Nandi customary law; that she has been residing on the suit property; and that the suit property is family land to which her children and herself are entitled. Hellen pleaded that the transfer to Johana was fraudulent as there was a restriction registered against the title. She therefore sought an order cancelling the transfer to Johana and ordering that the title to the suit property revert back to Jepkoech. In his suit Johana pleaded that he was the lawful registered proprietor of the suit property and had given notice to Hellen to vacate the suit property. He therefore sought, among other things, a declaration that Hellen was a trespasser on the suit property, and an order for her eviction.

[4] Upon hearing the evidence adduced by the parties and the submissions made by their counsel, the trial judge in an elaborate judgment considered, *inter alia*, whether the existence of H.C.C.C N0. 25 of 2005 and the rulings made therein rendered the suit filed by Hellen, that is E & LC No. 795 of 2012, *res judicata*. In his judgment, the trial judge found that the issue of the validity of the restriction order allegedly registered against the suit property was decided upon in H.C.C.C No.25 of 2005 where Azangalala J. (*as he then was*), held that the registered proprietor of the suit property was not impeded by the order of restriction from dealing with the suit property or transferring the suit property, and therefore there was nothing to bar the transfer of the suit property to Johana; that Hellen not having appealed against the ruling the principle of *res judicata* applied and the E & LC could not revisit the issue.

[5] The trial judge further considered whether the transfer to Johana could be challenged on the ground that the suit property was family land that could not be transferred by Jepkoech. In this regard the trial judge found that Hellen had failed to prove her alleged “woman to woman” marriage to Jepkoech under Nandi customary law, and therefore she had not proved that she had any interest in the suit property or *locus standi* to challenge the transfer to Johana.

[6] In addition, the trial judge found that contrary to Hellen’s contention, the Land Control Board had given its consent to have the suit property transferred from Jepkoech to Johana. The trial judge concluded that Hellen had no enforceable right over the suit property and that Johana was the proper registered owner of the suit property. Accordingly, the trial judge declared that Hellen was a trespasser on the suit property and ordered her eviction from the suit land, and also awarded damages of Kshs 50,000/= to Johana.

[7] In her memorandum of appeal, Hellen challenged the judgment on nine grounds. Jepkoech died before the appeal was heard. Hellen therefore abandoned some grounds of appeal that were specifically against Jepkoech and proceeded with the appeal against Johana. In the grounds of appeal the trial judge was faulted: for holding that Hellen’s suit was *res judicata* yet the hearing and proceedings in HCCC NO. 25 of 2005 were yet to be concluded; in holding that Jepkoech had an absolute right to transfer the suit property to Johana whereas the suit was family land and hence not transferrable; in holding that there was no restriction registered against the suit property whereas the same existed but was illegally removed; and in failing to make a decision on Hellen’s counterclaim.

[8] During the hearing of the appeal, **Mr. Yego**, counsel for Hellen orally submitted and explained that in light of the death of Jepkoech, they were only pursuing the appeal against Johana. Counsel submitted that the trial judge misdirected himself as he focused on the issue of the validity of the “woman to woman” marriage between Hellen and Jepkoech when the issue before the court was actually the validity of the transfer of the suit property by Jepkoech to Johana, when there was a restriction registered against the title. Counsel argued that the trial judge failed to determine this crucial issue.

[9] Mr Yego posited that Jepkoech who was the registered owner of the suit property stole a match against Hellen, when she transferred the suit property to Johana while HCCC No. 25 of 2005 was still pending; that *res judicata* could not arise as HCCC No. 25 of 2005 had not been conclusively determined; and that the trial judge misinterpreted the ruling made by Azangalala J in HCCC No. 25 of 2005 as the trial judge did not determine the issue of the validity of the restriction order, but only observed that it had not impeded the registered owner from dealing with the suit property.

[10] Mr. Yego referred to **section 136** of the **Registered Land Act** (Cap 300) (now repealed) that gave the Registrar of Lands powers to register any restriction against a title, to prevent fraud or improper dealing, maintaining that such powers could be exercised *suo motto*, and that under **section 138** of the **Registered Land Act**, the Registrar has powers to remove a restriction after giving the parties a hearing. Counsel noted that the restriction on the suit property was registered on 27th October 2009 and removed on 3rd March 2010, and that the suit property was thereafter transferred without Hellen being heard. Counsel urged that the removal of the restriction against the title to the suit property was irregular as there was no court order nor did the Land Registrar give Hellen a hearing. In addition, counsel submitted that the transfer to Johana was fraudulent as it was not made in good faith nor was there any valuable consideration.

[11] **Mr. Wafula**, learned counsel who appeared for Johana filed written submissions that he duly highlighted during the hearing. Mr. Wafula asserted that the presence of Jepkoech was crucial to Hellen’s appeal, and that Hellen having abandoned the appeal against Jepkoech the appeal against Johana could not stand as the appeal against Jepkoech abated on 12th August 2014 in accordance with **order 24 Rule 3(2)** and **Rule 5** of the **Civil Procedure Rules**, and therefore no orders could be issued against her.

[12] In regard to HCCC No. 25 of 2005, counsel submitted that Hellen did not have a counterclaim in that suit, and that her attempt to introduce the counterclaim through an amendment was thwarted when the court disallowed the application. Mr. Wafula argued that the trial judge did not misapprehend the ruling of Azangalala J; that the issue of “woman to woman” marriage was very relevant to Hellen’s claim, her contention being that it is her status as the customary “wife” to Jepkoech that gave her the right to the suit property; and that in the absence of that marriage, Hellen had no *locus standi* to challenge the transfer.

[13] In addition, counsel for Johana argued that in her suit Hellen sought similar orders as she had sought in her application in HCCC NO. 25 of 2005; that the application having been dismissed by a court of competent jurisdiction, the principle of *res judicata* was applicable; and that Hellen failed to prove any marriage relationship between her and Jepkoech. In this regard, the case of *Mary Wanjiku Gachigi vs Ruth Muthoni Kamau [2003]* eKLR, was relied upon. It was pointed out that Hellen did not seek for declaration of marriage as one of her prayers.

[14] Mr. Wafula maintained that Jepkoech being the absolute proprietor of the suit property, she had absolute and exclusive proprietary rights to use or dispose off the suit property or exclude any person from the suit property. The case of *Jacinta Wanjiku Kamau vs Isaac Kamau Mungai & another [2006]* eKLR, was relied upon for the proposition that there was no legal requirement that before a legal proprietor of land disposes off the land he/she should consult any third party be it his or her spouse. In regard to the restriction order, counsel posited that the Land Registrar did not testify nor was there any evidence adduced from the Land Control Board; that **Order 21 Rule 4** of the **Civil Procedure Rules** was properly followed. Counsel therefore urged the Court to dismiss the appeal with costs.

[15] In reply to the submissions made by Mr. Wafula, Mr. Yego responded that the abatement of the suit through the death of Jepkoech did not have any effect on the appeal; and that by virtue of Hellen having been on the suit property since 1987 she was entitled to the suit property as the transfer to Johana was subject to her overriding interest. Counsel further argued that the evidence of the Land Registrar was

not necessary as the “Green Card” was produced.

[16] Having considered the record, the respective submissions both written and oral, we find it appropriate to first address the issue of the appeal against Jepkoech. The Court was informed that the Jepkoech died on 12th August 2014. We note that the notice of appeal was lodged on 7th July 2014 and that by this time Jepkoech was still alive. The record of appeal containing the memorandum of appeal was lodged at the Court of Appeal registry on 13th November 2014, by which date the respondent had already died.

[17] **Rule 85** of the **Court of Appeal Rules, 2010** provides the procedure to be followed upon death of a party to an intended appeal as follows:

“(1) An appeal shall not be instituted in the name of a person who is dead but may be instituted in the name of his legal representative.

(2) An appeal shall not be incompetent by reason only that the respondent was dead at the time when it was instituted but the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased.”

[18] **Rule 99** of the **Court of Appeal Rules, 2010** provides as follows on the death of a party to an appeal:

“(1) An appeal shall not abate on the death of the appellant or the respondent but the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased.

(2) If no application is made under sub rule (1) within twelve months from the date of the death of the appellant or respondent, the appeal shall abate. (Emphasis added)

(3) The person claiming to be the legal representative of a deceased party to an appeal may apply for an Order to revive an appeal which has abated; and, if it is proved that the legal representative prevented by sufficient cause from continuing the appeal, the Court shall revive the appeal upon such terms as to costs or otherwise as it deems fit.”

[19] **Order 24 Rule (4)** of the **Civil Procedure Rules, 2010**, provides for the procedure to be followed in case of death of one of several defendants in a suit. Although Hellen’s counsel referred to Order 24, that Order is not relevant as it only deals with death of a defendant in a trial. It is **Rules 85** and **99** of the Court Rules that deals with death of a party to an intended appeal and an appeal respectively, that are relevant.

[20] Jepkoech having died after this appeal was initiated through the notice of appeal she was a party to this appeal, and therefore **Rules 85** and **99** were applicable. Any interested party to the appeal could have moved this Court to have Jepkoech’s legal representative substituted in her place before the expiry of twelve months from 12th August 2014, which is the date Jepkoech died. As no application was made, under **Rule 99** of the Court Rules, the appeal abated as against Jepkoech twelve months after her death, that is, on the 12th August 2015.

[21] In **Sultan Hasham Lalji & 2 others v Ahmed Hasham Lalji & 4 others [2012] eKLR**, this Court stated as follows on the effect of an appeal abating under **Rule 99**:

“The right of access to justice is a primordial right for every person and is a prerequisite to a fair trial. Surely, the Rules Committee could not have intended to take away that right from appellants or respondents who had the misfortune of losing one party in the suit through demise that they had nothing to do with ...

...

Our interpretation of Rule 96 (currently Rule 99) is that where there are several appellants/respondents and one of them dies, but the cause of action survives, the remaining parties’ right to continue with the appeal subsists and is not extinguished by the death of the party. Indeed, this Court has always continued to hear and determine such appeals to their logical conclusion...”

[22] We reiterate the above position and find that although the appeal abated against Jepkoech, the appeal against Johana survived, and Hellen’s right to continue with the appeal against Johana subsisted, and was not extinguished by the abatement of the appeal against Jepkoech.

[23] In regard to the issue of res judicata, it is not disputed that there was an earlier suit lodged by Jepkoech against Hellen and others, and that in that suit Hellen’s attempt to amend her defence to introduce a counterclaim for quiet possession on the right to work on the land as a lawful wife of Jepkoech was disallowed. In the same suit an application seeking to impugn the transfer of the suit property from Jepkoech to Johana, and an order restoring the suit property to Jepkoech and compelling Jepkoech to provide for Hellen and her family was also rejected; and the trial judge rejected the complaint by Hellen as having no substance as there was no impediment to the transfer of the suit land by Jepkoech to Johana

[24] In ELC No.795 of 2012, Hellen challenged the transfer of the suit property to Johana on two grounds: first that her interest as a “wife” to Jepkoech was not taken into account; and secondly, that the transfer was fraudulently done as there was a restriction registered against the title. It is apparent that both issues were raised in HCCC No 25 of 2005. In regard to the transfer, the court made a substantive determination that Jepkoech the registered proprietor had not sought any restriction against her title nor had the court issued any such restriction, and

therefore Jepkoech was not impeded from transferring the property to Johana.

[25] Although HCCC 25 of 2005 remained pending, the issue that remained alive in that suit was the issue whether Hellen was a trespasser on the suit premises and not the issue of the transfer of the suit property to Johana. Hellen’s interest in the suit property as a lawful wife is not an issue in HCCC No 25 of 2005, as it was not initially pleaded, and the court rejected the application seeking to introduce that claim by way of a counterclaim at the tail end of the suit. The issue of Hellen’s interest in the suit property as a lawful wife was therefore not conclusively determined.

[26] In considering the issue of *res judicata*, the trial judge properly directed himself on the law referring to section 7 of the Civil Procedure Act that encapsulates this principle, as well as appropriate case law. While there is no question that the parties in the cases giving rise to this appeal, and HCCC No.25 of 2005 were the same parties, and parties litigating under the same title, we are in agreement with the trial judge that there is at least one substantive issue that has already been determined between the parties in HCCC No 25 of 2005. This is the challenge to the transfer of the suit property from Jepkoech to Johana on the basis of the restriction that was allegedly registered against the title. It was therefore not open to the trial court to revisit this issue.

[27] Hellen’s suit was mainly hinged on the existence of the “woman to woman” marriage between her and Jepkoech. That relationship is what she contended gave her rights to the suit property, as Jepkoech would then be holding the suit property in trust for her and the rest of the family. This issue remained undetermined and it was therefore crucial for Hellen to prove that she was indeed in a marriage relationship with Jepkoech. The trial judge properly directed himself at paragraph 57 of his judgment as follows:

“It is trite law that the burden of proof is on the party asserting the existence of any question of fact. In this case, the question of fact is whether or not there existed a woman to woman marriage between Hellen Tum and Tapkili. The burden of proving such marriage is certainly on Hellen, as it is her who asserted that such marriage exists. ...”

[28] Upon considering the evidence before her, the trial judge concluded that the evidence adduced by Hellen was not sufficient to prove her alleged “woman to woman” marriage to Jepkoech. Being alive to our duty to reconsider the evidence and draw our own conclusion as an appellate court, we take into account that one of the most crucial evidence in proof of a customary marriage is the evidence of the customary rites required to establish a customary marriage and proof that these rites were indeed fulfilled.

[29] The evidence adduced before the trial judge was clear that one of the crucial ceremonies, in a Nandi Customary marriage is the “Koito” ceremony that signifies a formal engagement ceremony, and also signifies that the couple is now a married couple. Although Hellen maintained that this ceremony was performed she did not call any witnesses who were alleged to have attended the ceremony to confirm that such a ceremony did indeed take place. Secondly, Hellen claimed that dowry was negotiated, but admitted that she did not participate in the negotiations and failed to call even a single witness who participated in the negotiations. Thirdly, Hellen contended that Jepkoech identified one Roosevelt to sire children for her but Jepkoech denied this. Roosevelt who has had several children with Hellen would have provided useful evidence in this regard, but he was not called as a witness. Similarly, Andrea who allegedly introduced Hellen to Jepkoech was not called as a witness.

[30] We are therefore in agreement with the trial judge that the evidence that was adduced by Hellen fell short of proving her alleged customary marriage to Jepkoech. In the circumstances, there was nothing upon which her purported interest on the suit property could be anchored. There was a belated attempt to claim ownership by way of adverse possession. However, that claim falls flat on its face as it was evident that Hellen was on the suit property by virtue of authority given to her by Jepkoech. Her occupation was therefore not adverse to Jepkoech’s interest.

[31] The upshot of the above is that this appeal has no merit. It is accordingly dismissed with costs.

Dated and delivered at Eldoret this 20th day of September, 2018.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.