IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 39 OF 2012

BETWEEN

MARTHA NJERI WANYOIKE……..…… 1ST APPELLANT

GEORGE MBEKENYA.....2ND APPELLANT

JOHN KARANJA WANYOIKE.....3RD APPELLANT

VERSUS

PETER MACHARIA MWANGI…….……..….1ST RESPONDENT

JOSEPH KARANJA.....2ND RESPONDENT

GRACE NYAMBURA NDEGWA.....3RD RESPONDENT

MOSES MAINA THUKU.....4TH RESPONDENT

KURIA NGWARE.....5TH RESPONDENT

Appeal against the judgment and decree of the High Court of Kenya at Nakuru

*(**Maraga, J.**) dated 3rd day of November, 2011* ***in (HCCC No. 241 of 1998)***

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JUDGMENT OF THE COURT

The genesis of the litigation resulting in this appeal is a plaint dated the 19th day of June, 1998 by the appellant **Martha Njeri Wanyoike** and two others in their capacity as joint administrators of the estate of one **Samuel Wanyoike Karanja** (the deceased), directed at the respondents **Peter Macharia Mwangi**, **Joseph Karanja**, **Grace Nyambura Ndegwa, Moses Maina Thuki and Kuria Ngware** respectively. It was averred, *inter alia,* in the said plaint that sometime in the year 1988 the deceased without the consent of the family members purported to sell variously seven (7), four (4), three (3), two (2) and three (3) acres (the suit portions) out of plot No. 783 situate in Nyandarua District (the suit property) to the

respondents; that the said transactions were devoid of the blessings of the area Land Control Board thereby rendering them null, void and unenforceable in law; that the appellant and her co-administrators had variously requested the respondents to accept any monies paid towards the said void transactions and then vacate the suit portions but they had adamantly refused to do so hence necessitating the filing of the suit to seek their eviction from the suit portions, damages for trespass, costs, interest, and any other relief that the court may grant.

The respondents jointly resisted the Appellant's claim vide a defence and counter claim dated the 2nd day of March, 2009. In their defence, the Respondents generally denied the Appellants' claims, while in their counter claim, they *inter alia* averred that their respective purchases of the suit portions were with the consent of the deceased's third wife; the deceased caused the suit portions to be subdivided, excised and given to each respective respondent; the deceased was always ready and willing to obtain consent for the transfer of the said suit portions to the Respondents but he died before doing so; the failure to obtain the requisite Land Control Board consent notwithstanding the deceased included the respondents in the list of beneficiaries in his last will. They further averred that even the Appellant and her co-administrator' acknowledged the respondent's entitlement to the suit portions by including them in the initial confirmed grant as beneficiaries to the deceased's estate alongside other family members. It was only much later that the Appellant and her co-administrators changed their minds and rectified the grant to exclude the respondents from the list of beneficiaries to the deceased's' estate. It was further the respondents' averments that they had all along lived cohesively with the deceased's' family members for various periods of time in excess of twelve (12) years. Some respondents had even buried their loved ones on their respective suit portions without any objection from the deceased's' family members. They therefore counter claimed for the respective suit portions to be transferred to them respectively. The respondents' defence and counterclaim went uncontroverted.

Parties were heard on their merits. The evidence for the appellant was tendered through a sole witness **George Mbekenya** who was one of the co-administrators and who has since withdrawn from pursuing the appeal, while that on behalf of the respondents was tendered through three (3) witnesses namely **Peter Kabugi Gatuma (Peter) (DW1)**, **Peter Macharia Mwangi** (**Macharia) DW2** and lastly **Veronica Wanjiru Kuria (Veronica) DW3**. Parties also filed their respective written submissions. The learned trial Judge D. Maraga, J (now the Chief Justice) analyzed the content of the record and reasoned *inter alia* thus:

> ***"On the merits of the case, it is not in dispute that the deceased sold a total of 19 acres of the suit land to the defendants between 1985 and 1988. The plaintiffs' case is simple. As no Land Control Board consent was obtained in respect of any of the sales, all those transactions are void for all purposes and the defendants are therefore trespassers on the suit land who should be evicted.***
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> ***From the circumstances of this case, I cannot accept that contention. As the first defendant testified, to safe (sic) the suit piece of land, the deceased sold the said portions to the defendants to pay off the SFT loan. The plaintiffs themselves have for a long time acknowledged and recognized the defendants' interest on the suit land. They never raised any objection to the defendants burying their loved ones on their respective portions. As a matter of fact the second plaintiff was the master of ceremonies at the second defendant's son's burial. For a long time they freely exchanged visits with the defendants.***
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> ***When the plaintiffs applied for letters of administration in respect of the deceased's estate they stated the deceased's interest in the suit land as comprising of 52 acres thus excluding the portions already sold to the defendants and other purchasers. It is later, clearly as an afterthought that they caused the certificate of confirmation of grant to be rectified and included the defendants' portions."***

It is on the basis of the above reasoning among others that the learned Judge upheld the respondents counterclaim.

The Appellant and her then co-administrators were aggrieved and they jointly preferred the appeal under review, but the co-administrators withdrew from pursuing it before it was heard. The Appellant as the remaining sole administrator is now before us on a first appeal. Initially six (6) grounds of appeal were raised. Learned counsel **Mr. S.L.M. Muhia** abandoned grounds 3, 4 and 6, leaving grounds 1, 2 and 5 for determination. These are that the leaned judge of the Superior Court erred in law in:-

- ***declaring that the remedy of adverse possession was available to the respondents even though they had not prayed for it in the counterclaim.***
- ***entering a claim for adverse possession filed through a plaint whereas it should have been filed by way of an Originating Summons.***
- ***introducing in his judgment extraneous, matters not adduced in evidence***.

In a very brief submission to Court, learned counsel **Mr. S. L. M. Muhia** submitted that the learned Judge erred in extending time for Land Control Board consent as it had not been pleaded.

To buttress his submissions learned counsel **Mr. Muhia** cited the case of **Fernandes Versus People Newspaper Ltd [1972] EA 63 And Captain Harry Gandy Versus Caspar Air Charters Limited [1956] EACA Volume 23 page 139** both for the propositions that issues for determination by a court of law must flow from the pleadings, unless these are subsequently framed by the parties in the course of the trial and then left to the court for determination.

In response to the appellant's submissions, learned counsel Mr. **Gichuke Ribathi** also in a brief submission submitted that lack of the Land Control Board consent was a subject of the suit and was rightly addressed by the learned Judge; even though it had not been specifically pleaded. In Mr Ribathis' view the learned Judge had a discretion to grant it under prayer (g) of the counterclaim, which counter claim, was never defended and therefore all the reliefs sought by the respondents therein sailed through. Further that **Section 8 (1)** of the Land Control Act donates a discretionary power to the High Court to extend time within which to obtain Land Control Board consent where sufficient cause has been shown. Such cause had been shown in the instant appeal as there is clear demonstration on the record that efforts were made to obtain the requisite consent but such efforts were frustrated by the deceased's family members who should not now be heard to complain that the respondents did not obey the law. Lastly, Counsel contended, that the appeal against the 3rd respondent had abated.

Learned counsel **Mr. Wilfred Konosi,** submitted that the appeal having been filed by joint administrators, two of whom withdrew from pursuing it before it was heard, the remaining administrator who is the Appellant could not act alone. In **Mr. Konosi's** view, the appeal as now stands before us is incompetent and should be struck out.

In reply to the respondent's submissions, learned Counsel **Mr. Muhia** conceded that the appeal against the 3rd respondent had abated, but left the issue of the competence of the appeal as presently pursued by a sole administrator after the co-administrators withdrew from pursuing it to the court to determine.

This is a first appeal. Our mandate is as set out by the court in **Sumaria& another versus Allied Industries Limited [2007] eKLR** where it was held *inter alia* that:

> ***"1.Being a first appeal, the court was obliged to reconsider the evidence re-evaluate it and make its own conclusions. A Court of Appeal would not normally interfere with a finding of fact by the trial court unless;***
>
> - ***It was based on no evidence or***
> - ***It was based on a misapprehension of the evidence or***
> - ***The Judge was shown demonstrably to have acted on wrong principle in reaching the finding he did."***

We have revisited the record and the impugned judgment and considered it in the light of the rival submissions set out above. In our view, the following are the issues that arise for our determination:-

- Whether the appeal as presently pursued by the Appellant after two of her co-administrators withdrew from pursuing it is competent;
- Whether the respondents claim of entitlement to their respective suit portions by way of adverse possession laid through a counter claim is sustainable;
- Whether the learned judge fell into error or alternatively took into consideration extraneous matters not pleaded when he *suo motu* invoked section 8(1) of the Land Control Board Act to extend time within which consent for the transfer of the suit portions to the respective respondents could be obtained.

In response to issue number one (1) it is not in dispute that the appeal under review was initiated by the Appellant and two other co-administrators who have since withdrawn from pursuing it. **Section 81** of the **Law of Succession Act Cap 160 Laws of Kenya** provides *inter alia* that:

> ***"Upon the death of one or more or several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them."***

Section 81 of the Act (supra) only makes provision for the death of a joint administrator/ or executor. It does not make provision for instances where a joint administrator withdraws from pursuing an ongoing litigation initiated jointly by either the executors or administrators on behalf of a deceased person's estate. There is no other provision traced in the said legislation that addresses the above situation. It is however our view that, if an ongoing litigation does not terminate upon the death of a joint executor or administrator, there is no reason as to why such a litigation should terminate upon the withdrawal of a joint executor or administrator from pursuing it. It is therefore our finding that the appeal as presently pursued by the Appellant in her capacity as the sole remaining administrator interested in pursuing it is competent and will be determined on its merit.

Turning to the second issue, it is not disputed that the respondents counterclaimed the suit portions from the appellant and her then co-administrators through adverse possession. **Paragraph 26** of the defence and counterclaim reads as follows:

> ***"26.The first defendant has been in occupation of the afore-mentioned portion of land for 22 years, the 2nd defendant has been in occupation of the aforementioned portion of land for 24 years, the 3rd respondent has been in occupation of the afore mentioned portion of land for 20 years, the 4th defendant has been in occupation of the aforementioned portion of land for 22 years and the 5th defendant has been in occupation of the aforementioned portion of land for 20 years."***

In consequence of their averments in the defence and counter claim the respondents sought declarations that they were each entitled to their respectful suit portions.

The learned judge analyzed the record before him and made observations generally that the respondent's case was that the appellant and her administrators at the time, having acknowledged and recognized the respondents' interests in their respective suit portions and the respondents having variously stayed in their respective suit portions for periods in excess of twenty (20) years, that is why they had contended in their counter claim that the deceased's' interest in their respective suit portions had been extinguished by adverse possession and therefore counterclaimed that the Appellant and her then co-administrators be compelled to transfer to the respondents their respective suit portions and in default the court to issue an order directing the Land Registrar to transfer the said suit portions in their favour.

On the mode of presentation of the claim for adverse possession, the learned judge observed that the same had been introduced into the proceedings by way of a counter claim as opposed to an originating summons under the then **Order 36rule 3D** of the **Civil Procedure Rules** now **Order 37 rule 3D of the Civil Procedure**. The learned judge then reviewed case law on the subject namely **Bwana versus Said & 2 Others [1991] KLR 454; Kenganga versus Ombwori [2001] KLR 103; Catherine WaithakaMande versus Gervas P. MwangiNakuru HCCC No. 19 of 2004 and Mariba versus**

Mariba& Another [2007] 1 EA 175 and made observations that on the basis of the above case law the Court of Appeal was divided as regards the proper mode of presenting an adverse possession claim in instances where this is to be raised as a defence. He went on further to observe that he had dealt with a similar challenge in the case of **Catherine Waithaka Mande versus Gervas P. Mwangi**(*supra*) in which he had elected to apply the decision of **Mariba versus Mariba& Another** (supra) where the court had upheld the claim of adverse possession laid through a counter claim and for that reason upheld a claim for adverse possession similarly laid by way of a counter claim in the **Catherine Waithaka Mande case** (*supra*). On that account, the learned Judge found the claim for adverse possession as laid by the respondents herein through their counter claim sustainable.

We have revisited the above case law on our own, and it is our finding that the learned judge made no error on the procedural issue as it was in tandem with the decision of this court in **Mariba versus Mariba**(*supra),* which was binding on him. Second, there were no peculiar circumstances that could have compelled the learned judge to distinguish not only his own previous decision in the **Catherine Waithaka Mande** case (*Supra*) as well as that of the Court of Appeal in **Mariba versus Mariba** (*supra*). Third, he was also obligated to be consistent in his reasoning especially in a situation where the facts in the **Catherine Withaka Mande** case (supra) were similar to those in the instant appeal .

This position has now been re-affirmed in **Gulam Miriam Noordin versus Julius CharoKarisa [2015] eKLR** where the court *inter alia* made observation as follows:-

> ***In NjugunaNdatho v MasaiItumo& 2 Others Civil Appeal No. 231 of 1991, this Court held that the respondent's counterclaim for adverse possession was misconceived because it ought to have been brought by originating summons. The orders vesting the property in the respondent by the High Court was set aside.***
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> .....
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> ***That position is no longer tenable. Be that as it may, and to answer the question whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala Versus Okumu [1997] LLR 609 (CAK), which like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in Bayete Co. Ltd. v Kosgey [1998] LLR 813 where the plaint made no specific plea of adverse possession, the plea was nonetheless granted.***
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> ***The court has in Teresa Wachuka Gacheru v Joseph Mwangi Civil Appeal 325 expressly stated that irrespective of the procedure adopted, the onus is on the person claiming adverse possession to prove that he has used the land he is claiming nec vi, nec clam, necprecario. It is clear that the change in the court's approach to this question has, by and by been dictated by the need to do substantive justice.***

It follows therefore that the current correct position in law is that a claim for adverse possession laid through a counter claim like in the instant appeal, is sustainable subject only to the requirement that it be proved to the required threshold as it cannot be assumed as a matter of law from mere exclusive possession. See the case of **Kweyu versus Omutu [1990] KLR 709**, per Gicheru JA (as he them was)

The learned judge carefully examined the evidence on adverse possession and was satisfied that it was long and continuous, held under a claim of right and with intent to hold adversely to the exclusion of the appellants. We have no reason to fault those factual findings and we affirm them.

Turning to the last issue, it is evident from the record that there was no specific pleading or prayer for the court to grant an extension of time within which to obtain the **Land Control Board's** consent for the sanctioning of the sale transactions of the suit portions and their subsequent transfers to the respondents respectively. Learned counsel **Mr. Ribathi** submitted that through prayer (g) in the counterclaim was sufficient basis for their relief. There is however no prayer (g) on the record. What we have are prayers

(vi) and (vii) of the counterclaim. These read thus:-

> ***"(vi) That the Registrar of Lands in Nyandarua District be ordered to transfer the respective parcels to the defendants;***
>
> ***(vii) That the plaintiffs be restrained by a permanent order of injunction from in any way interfering with the quiet possession of the defendant's aforesaid portions of land."***

Before reaching the conclusion that it was prudent for him to order the extension of time within which to seek Land Control Board's consent in favour of the respondents, the learned judge reasoned thus:-

> ***"taking all the factors of this case into account and particularly the fact that the defendants have buried many of their relatives on the suit land without any objection from the plaintiffs or any member of the deceased's family, justice demands that I exercise my discretion under the proviso of section 8(1) of the Land Control Act and, despite the passage of time, extend the period for obtaining consent to the defendants' transaction."***

Then concluded thus:-

> ***"consequently I grant the defendants the declarations they have sought in the counterclaim and direct that the plaintiffs do within 30 days of the date hereof apply for consent of the defendants' transactions and thereafter appear before the area Land Control Board for its consideration. If they fail to do so, the defendant are at liberty to get the Deputy Registrar of this court to execute the applications for consent forms and this judgment shall serve as authority to the area Land Control Board to consider the defendants' applications in the absence of the plaintiffs. Thereafter the Deputy Registrar shall also execute all other documents on behalf of the plaintiffs to effect the transfers of the defendants' portions to them. I also grant the defendants the perpetual injunction they sought to restrain the plaintiffs, their family members, servants and or agents from evicting the defendants from or in any way interfering with their occupation and use of their respective portion of the suit piece of land.***

The law is that parties are bound by their respective pleadings and only matters so pleaded fall for determination by the court unless these are framed by the parties and left for the court to determine. See the case of **Odd Jobs versus Mubia [1970] EA 476** for the holding *inter alia* that:-

> ***"(i) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision."***

As submitted by learned counsel **Mr. Ribathi** the issue of extension of time for Land Control Board consent was not specifically pleaded or prayed for in the counter claim but there is no doubt that the issue as to why the Land Control Board consent had not been obtained was alive issue both in the pleadings and the evidence of both sides. In this regard, it is our view that there is no way the learned judge could have concluded his reasoning and determination of the issues in controversy as between the parties without addressing it and making an appropriate determination thereon. It therefore qualifies as an issue that was framed by the parties in the cause of the trial through their conduct and evidence then left for the court to determine.

Section 8(1) of the **Land Control Act** invoked by the learned judge states:-

> ***"An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land Control Board within six months of the making of the agreement for controlled transaction by any party thereto Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do have such conditions, if any, as it may think fit."***

In the case of **Joseph Boro Ngera versus Wanjiru Kamau Kaime [2010] eKLR**, the court made observations that the High Court when exercising the powers donated by section 8(1) of the Land Control Act, it is deemed to be exercising a discretionary power. That is the reason why the word 'may' is used by the legislation donating the power. The principles that guide the exercise of judicial discretion are now well settled. See **Githiaka versus Nduriri [2004] 1 KLR 67** where in it was held *inter alia* that judicial discretion is to be exercised judiciously that is to say on sound reason rather than whim, caprice or sympathy.

The circumstances in which an appellate court can interfere with discretionary orders of a superior court were set out in the case of **Mbogo& Another versus Shah [1968] EA93** wherein it was held inter alia that:

> ***"An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he/she should not have acted upon or failed to take into consideration matters which he should not have taken into consideration and in doing so arrived at a wrong conclusion."***

In the instant appeal, the matters the learned judge was obligated to take into consideration and which he did in fact take into consideration when arriving at the conclusion he did were that the appellant and her co-administrators did not deny that the sale transactions for the suit portions were entered into between the deceased and the respondents; that money had changed hands between the deceased and the respondents as valid consideration; that the specific suit portions were excised for each respondent; that each respondent settled on their respective suit portions, developed them and even some buried their loved ones on the said suit portions, without any objections from the deceased's family members. The main objection advanced by the appellant in opposition to the respondent's claim was lack of sanctioning of the said transactions by the area **Land Control Board**. Second, that there is no doubt that the respondents could have specifically counter claimed for the relief of extension of time within which to obtain the **Land Control Board** consent, but they did not. Third that the reliefs sought by the respondents in prayer (vi) and (vii) of the Counter claim could not without an attendant order for the sanctioning of the said transactions by the area Land Control Board as this was a mandatory requirement of law.

In view of the above observations we find nothing that could suggest that the learned Judge acted either on caprice or whim in the exercise of his judicial discretion under section 8 (1) of the Land Control Act. He gave sound reasoning for the conclusion reached. The learned judge's exercise of judicial discretion was therefore not outside the ambit of the principles laid down in the **Mbogo & Another versus Shah** case (supra). Second, in our view the relief granted was consequential to the relief prayed for at prayers (vi) and (vii) of the counterclaim. See the case of **Rex Hotel Limited versus Jubilee Insurance Company Limited [1972] EA 211.**

The upshot of all the above is that we find no merit in this appeal. It is dismissed with costs to the respondents both on appeal and the court below.

Dated and Delivered at Nakuru this 8th day of December, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR