



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 17 OF 2015

BETWEEN

HANNAH NJERI NYAGA.....APPELLANT

AND

SAMUEL KAMAU NJUGUNA.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kerugoya (Olao, J.) dated 3rd December, 2014

in

E. L. C. No. 424 of 2013)

JUDGMENT OF THE COURT

1. As will become apparent shortly, the appellant herein, **Hannah Kamau Njuguna** (Hannah), has not been served well by her legal advisors. For a long time, she was claiming half the interest in land parcel number **LOC 8/KIONJOINI/264** (the disputed land) measuring about 1.8 Acres, on account of her late husband's alleged entitlement to that share which she claimed was held on his behalf by his step-brother, one **Gatikwa Gathanga** (Gatikwa). But the claim has either never been formally raised before courts of law, or when it was, it was never pursued for determination on merits.
2. From the record before us, Gatikwa was the sole registered proprietor of the disputed land. Before his death in the year 2010, he had sold the entire land to the respondent, **Samuel Kamau Njuguna** (Samuel). According to Samuel, he bought the disputed land from Gatikwa in 1998 and was registered as the sole proprietor in the year 2000. Thereafter, Hannah unlawfully entered into the land and started cultivating claiming the interest aforesaid. That is when Samuel sued her for trespass and eviction before **Murang'a PMCC No. 291 of 2002** but the case was struck out on 10th April 2003. He subsequently sued her in **Nairobi in HCCC 569 of 2005** pleading the same cause of action but that suit was also struck out on 7th December, 2007 by Rawal J. (as she then was) because he had not stated in his verifying affidavit that there had been other previous suits in respect of the same piece of land between him and Hannah.
3. Those previous suits, as Hannah complained, were **Murang'a PMCC No. 382/1998** in which she had sued Gatikwa for half share of the land; **Nyeri HCCC 189/2000** in which she had claimed ownership of the disputed land through adverse possession; and **Nyeri Provincial Appeal Tribunal case No.**

28/2001 in which she had appealed the decision of the **Kahuro Land Disputes Tribunal case No. 3/2001**. It transpired, however, that Tribunal Appeal No. 28/2001 was adjourned to await the result of HCCC No. 189/2000 which was ultimately struck out for want of prosecution on 7th March 2006. Emboldened by lack of any other case between him and Hannah, Samuel went back to the High Court and filed **Kerugoya ELC No. 424 of 2013** rehashing the same pleadings on trespass and seeking eviction. In her defence, Hannah repeated the same assertion that she owned half share of the land and that there were previous cases between her and Samuel which had either been determined in her favour or were pending, hence the suit was based on a false verifying affidavit or was *res judicata*. She filed an application to have the suit struck out on those grounds and the matter fell before Olao J. for hearing and determination. In his Ruling made on 16th September 2013, Olao J. carefully examined the position regarding all the previous cases and held that they were either non-existent or were not between Samuel and Hannah. The application was dismissed and there was no appeal.

4. The main suit was also determined by Olao J. after hearing the sole evidence of Samuel and Hannah. Hannah maintained that her late husband had a right to half the disputed land but she had not filed any counterclaim or called other evidence to support that claim. The Court held that Samuel, as the registered proprietor of the disputed land, had protection of the law in **Sections 27 and 28** of the **Registered Land Act** (now repealed) and there were no overriding interests established under **Section 30** of the Act, including a trust in favour of Hannah, which was not proved as a matter of fact. The claim of Samuel on trespass was allowed but his claim for *mesne profits* was disallowed for want of evidence. Hannah was given three months from 3rd December 2014 to vacate the portion she occupied. She was aggrieved by that decision and that is why she is now before us.

5. Learned counsel for Hannah, **Mr. Omolloh** had enumerated five grounds in his memorandum of appeal which amounted to a general complaint about the failure by the trial court to consider pending cases and all the facts presented by Hannah at the hearing of the case. However, when he addressed us, **Mr Omolloh** said nothing about the grounds of appeal but simply told us that the appellant had been on the land for 20 years and the decree should therefore be set aside. Learned counsel for Samuel, on the other hand urged us to dismiss the appeal since there was no counterclaim before the trial court and in any event, findings were made about previous suits relating to the same land as well as the parties in those cases and there was no challenge to those findings.

6. Although in his brief address, counsel for the appellant simply submitted, without more, that Hannah had been on the disputed land for 20 years, we have, as we must on a first appeal, *reconsidered the evidence, re-evaluated it and drawn our own conclusions, always bearing in mind that we have neither seen nor heard the witnesses and should make due allowance in that respect*. See ***Selle v. Associated Motor Boat Company [1968] E.A. 123*** at p.126. As stated earlier, the only evidence on record is that of Samuel and Hannah. All Samuel did was to establish his right of ownership of the disputed land through purchase and registration as the absolute proprietor. The purchase was made long before the seller, Gatikwa, died and no one objected to it. The local Land Control Board gave its consent to the transaction and he took possession after purchase as there was no one else using it. He asserted that Hannah entered the land by force and started cultivating in 2005, and that is when he reported the matter to elders who decided in his favour. He also filed several court cases, the last of which was heard on merits and decided in his favour.

7. On the other hand, Hannah stated that her husband had died 20 years before she testified in January 2014, and was buried in his father's land elsewhere. She had, however, lived on the disputed land with him as he was entitled to half of it despite registration of the whole land in the name of Gatikwa. According to her, Gatikwa should only have sold his half share. As far as she knew, she had taken the dispute between her and Gatikwa to the elders who decided in her favour but she was unable to produce the decision which she said her lawyers had. She had not made any counterclaim for the land in her pleadings.

8. With such kind of pleadings and evidence, it is not difficult to see why the trial court decided in favour of the respondent. The proprietary interest of Samuel may well have been impeachable if a trust had been pleaded and proved. As correctly stated by the trial court citing the case of **Mbothu & 8**

Others vs. Waitimu & 11 Others 1980 KLR 171;

“The law never implies, the Court never presumes a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

9. It was admitted by Hannah that Gatikwa was the first registered owner of the land, and there was no indication that the land was held in trust for anyone else. Her late husband had never laid a claim for half the land during his lifetime. Nor did Hannah lay any claim before Gatikwa died in the year 2010. It is difficult to see how her belated claim for the land could stand. In any event it was not pleaded in the suit before the High Court. We find in the circumstances, as the trial court did, that the respondent was protected under the law as no fraud was pleaded or proved against him. Furthermore, we find it idle for the appellant to purport to challenge the ruling of the court on whether there were previous cases which rendered the respondent’s case *res judicata* or invalid. That is because, firstly, there was no challenge to the decision of the High Court when it was rendered on 16th September 2013, and secondly, the court records speak for themselves.

10. In all the circumstances, this appeal is for dismissal and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nyeri this 14th day of October, 2015.

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