



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 59 of 2001

JACINTA WANJIKU KAMAU APPELLANT

AND

ISAAC KAMAU MUNGAI 1ST RESPONDENT

NDIRANGU GITIGI 2ND RESPONDENT

*(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Justice Aganyanya)
dated 21st August, 2000*

in

H.C.C.C. NO. 3874 OF 1988)

JUDGMENT OF THE COURT

This is an appeal by the unsuccessful plaintiff from a judgment of the superior court (Aganyanya, J.) delivered on 21st August, 2000 in which the learned Judge dismissed the plaintiff's suit. The dispute herein can be traced back to the ***High Court Civil Case No. 3874 of 1988***, in which the appellant sued the two respondents. In the Amended Plaint the appellant, ***Jacinta Wanjiku Kamau*** (as the plaintiff in the superior court) averred:-

- 1. The plaintiff is an adult female residing as a housewife at Gatitu, Gatundu Division in Kiambu District in the Republic of Kenya and her address for the purpose of this suit is care of Asst.Chief Joseph Mwangi Kiarie, Gatitu Sub-Location, Gatundu Division, Kiambu District aforesaid.***
- 2. The First defendant is an adult male residing at Karati Settlement Scheme, Nyandarua District in the Republic of Kenya and his address of service for the purposes of this suit is care of Karati Settlement Scheme, South Kinangop Nyandarua District aforesaid.***
- 3. The second defendant is also an adult male residing and working for gain in Gatundu Division of Kiambu District aforesaid and service of summons herein will be effected through the Plaintiff.***
- 4. In or about the year 1984 the Plaintiff and the first defendant were lawfully married in accordance with Kikuyu customary law and all rites and ceremonies performed and thereafter the said customary marriage was solemnized under the provisions of the African Christian Marriage and Divorce Act, Chapter 151 Laws of Kenya, in or about the year 1969 and there are now eight children***

of the said marriage.

5. *In or about the year 1987 the First Defendant sold and alienated portion of Land Parcel No. Kiganjo/Kiamwangi/856 to the second defendant for a consideration which the first defendant did not and has not up to the filing hereof disclosed to the plaintiff, without the consent of the Plaintiff and the said eight children of the marriage, which said transaction left only two (2.0) acres of the family property now registered as Land Parcel No. Kiganjo/Kiamwangi/1072 in the name of the first defendant (hereinafter referred to as “the suit premises”).*

6. *In or about the year 1988 the first defendant further negotiated for the sale and transfer to the second defendant of the suit premises which said negotiations and dealings were consented to by Gatundu Land Control Board despite vehement protests by the plaintiff on behalf of the said children and herself, and on 9th day of August, 1988 the plaintiff lodged a caution with the Land Registrar, Kiambu against the first defendant’s title to the suit premises.*

7. *The plaintiff and the said children depend solely on the income of the cash and subsistence crops grown on the suit premises and also reside thereon in a stone-built permanent residence comprising five bed-rooms, lounge, sitting room, store, bathroom-cum-toilets, kitchen and other out houses appurtant thereto.*

8. *The second defendant is unscrupulously and miserably bent on throwing the legitimate children of the first defendant and the plaintiff from the suit premises even though he (the second defendant) has acquired plenty of land from the first defendant as averred to in paragraph 5 of this amended plaint.*

9. *By reason of the matters complained of as aforesaid and in the event of the suit premises being alienated and transferred to the second defendant as intended by the first defendant, the plaintiff and her children of the marriage with the first defendant will suffer irreparable loss and damage.*

10. *The cause of action has arisen at Gatundu in Kiambu District within the jurisdiction of this Honourable Court.”*

In that amended plaint the appellant sought the following reliefs:-

“(A) That the first defendant holds the suit premises for himself in trust for himself, and in trust of (sic) the children of the marriage with the plaintiff and the plaintiff during her lifetime;

(B) That the Land Registrar, Kiambu do not make any entry relating to or dealing with Land Parcel No. Kiganjo/Kiamwangi/1073 without further orders of Court;

(C) That the letter of consent issued by Gatundu Land Control Board relating to the transaction of the suit premises between the first defendant and the second defendant be rescinded and declared null and void.

(D) That the first defendant do forthwith refund to the second defendant any monies received by him in consideration of the suit premises.

(E) That the plaintiff and the children of the marriage do quietly and peaceably occupy and enjoy the suit premises as of right and beneficiaries thereof without undue interruption and/or interference by or of the first defendant or the second defendant;

(F) That both the first and second defendants be condemned for costs in this suit.”

In his written statement of defence the 1st respondent (as the 1st defendant in the superior court) averred:-

“2. The defendant admits paragraph 3 of the plaintiff filed herein.

3. The defendant states that in or about the year 1983 he sold a part of the parcel of land Kiganjo/Kiamwangi/865 with the consent and full knowledge of the plaintiff.

4. The defendant in 1988 also sold 1.75 acres of parcel of land Kiganjo/Kiamwangi/1072 and consent to the transfer and sub division was granted to the said transaction.

5. The defendant will contend that he did not need the consent and or authority of the plaintiff to the said transaction as he is the sole proprietor of the said parcel of land.

6. The defendant will further contend that the transaction was done with full knowledge and consent of the plaintiff.

7. The defendant will contend that the consent having been granted to the transaction and the parcel of land having been sub-divided the plaintiff has no loci standi.

8. The defendant states that the plaintiff and her children will not in any way suffer as he has another parcel of land at Kinangop where the plaintiff has refused to move to.”

On his part the 2nd respondent (as the 2nd defendant in the superior court) filed a written statement of defence in which he stated inter alia:-

“2. The second defendant states that he purchased a portion of parcel of land Kiganjo/Kiamwangi/1072 for valuable consideration from the first defendant with the full knowledge and consent of the plaintiff.

3. The second defendant paid the purchase price to the first defendant in the presence of the plaintiff.

4. The second defendant will contend that the plaintiff’s case is bad in law and discloses no cause of action against him.

5. The second defendant will further contend that all formalities having been complied with this suit has no merits and the same should be dismissed.”

In a nutshell, it was the appellant’s case that the 1st respondent who was (and still is) her husband held the suit land in trust for herself and the children of the marriage and that he had no authority to sell any portion of it without consent from her and other members of the family. The 1st respondent on his part took the stand that as the registered proprietor of the suit land he had the right to subdivide it and sell any portion of it to any other willing buyer without necessarily seeking consent from his wife, the appellant herein. The case for the 2nd respondent was simply that of a purchaser who paid the agreed purchase price and went through the normal process of purchasing land in accordance with the law.

The foregoing is the synopsis of the pleadings as can be deciphered from the plaint and the written statements of defence which we reproduced at the commencement of this judgment.

The dispute herein can be traced, as we have already stated, back to an Amended Plaint filed in the superior court in *September 1988*. The hearing of the suit in the superior court was delayed for a considerable period due to numerous acrimonious applications and even an attempt to have the matter resolved by way of arbitration by the Provincial Administration. The hearing of the suit finally commenced before Aganyanya, J. as from 27th June, 2000. The appellant (as the plaintiff) testified before the superior court in support of her claim. The gist of her evidence was that the 1st respondent who was her husband subdivided the suit land and then sold a portion of it to the 2nd respondent. Her main complaint was that she did not consent to the subdivision and the sale of the said land by the 1st

respondent. She therefore asked the superior court to cancel the sale and have the land registered in the names of the children of the 1st respondent.

The 1st respondent, **Isaac Kamau Mwangi**, in his evidence before the superior court, stated that he had borrowed money from **Agricultural Finance Corporation (AFC)** and that he fell into arrears with the repayment. He decided to subdivide his land Kiganjo/Kiamwangi/856 and sold two acres to the 2nd respondent who was the sub chief of the area. There developed some differences between the 1st respondent and the 2nd respondent. The 1st respondent bought another piece of land measuring about 30 acres in Kinangop. He proceeded to marry another wife who now lives with him on this piece of land in Kinangop.

The 2nd respondent, **Onesmus Ndirangu Gitigi**, testified that he knew that the 1st respondent had AFC loan and that he (2nd respondent) rescued the 1st respondent when the land was to be sold. It was as a result of the AFC loan that 2nd respondent bought part of the 1st respondent's land. It was the 2nd respondent's evidence that he did not know why he was sued by the appellant since she (appellant) did not sell any land to him. He said that the consent of Land Control Board was obtained for all these transactions.

After the parties had testified, the learned counsel appearing for them made final submissions and the learned Judge reserved his judgment which he delivered on 21st August, 2000. In that judgment, the learned Judge dismissed the appellant's case and went on to state:-

“There will be an order for the second defendant to be registered proprietor of 1.75 acres of Kiganjo/Kiamwangi/1072 while the plaintiff will be registered as proprietor of 0.25 acre of the same land after necessary subdivision and transfer. The first defendant to sign the requisite survey and transfer documents and the second defendant to pay for the exercise. In event that the first defendant refuses to sign the documents the Deputy Registrar of this Court to do so.”

Being dissatisfied by that judgment, the appellant through her counsel, filed this appeal setting out the following eight grounds of appeal:-

- “1. THAT the learned Judge erred in law and in fact by failing to appreciate that the appellant had proved her case on a balance of probabilities and was therefore entitled to relief sought in the Amended Pleint.***
- 2. THAT there is a substantial error and defect on record in that the learned Judge misdirected himself by finding that the second respondent amended his statement of defence on 18th December, 1998 when on the 9th day of June, 1999 the second defendant withdrew his application dated 18th December, 1998 seeking to amend his defence.***
- 3. THAT the learned Judge erred in law and in fact by finding for the second respondent when the second respondent's claim against the first respondent was on 15th November, 1999 struck out for being time-barred.***
- 4. THAT the learned Judge erred in law and in fact by awarding the second respondent 1.75 acres of the suit land when there was no counter-claim filed on behalf of the second respondent and when the second defendant's claim against the co-defendant (first respondent) had been struck out for being time barred.***
- 5. THAT the learned judge misdirected himself by awarding 0.25 acres and 1.75 acres respectively to the appellant and to the second respondent when the learned judge had dismissed both the appellant's suit and the second respondent's counter-claim.***
- 6. THAT the learned Judge erred in law and in fact by awarding reliefs that had not been prayed***

for by the second respondent.

7. THAT the learned judge erred in law by failing to determine a material issue in controversy that though the suit land was registered in the name of the first respondent the said first respondent held the same in trust for himself, the appellant and the children of the marriage.

8. THAT the learned judge's decision is contrary to law and to public policy as he proceeded to award the second respondent three quarters of the suit premises thereby leaving the appellant and her children destitute when the second respondent had indicated that he would have been satisfied with an order for the refund of the purchase price by the first respondent."

This appeal came up for hearing before us on 8th December, 2005 when Mr. Murithi Rinkanya appeared for the appellant, while Mr. P.J. Kiiru appeared for the 1st respondent and Mr. P.K. Njoroge appeared for the 2nd respondent. When Mr. Rinkanya concluded his submissions the matter was adjourned to 14th March, 2006 when the other two advocates made their submissions.

The thrust of Mr. Rinkanya's submission was that the learned Judge failed to consider the issue of trust which the appellant had pleaded in the plaint and that had he considered her evidence then the decision of the superior court would have been different. Mr. Rinkanya went on to argue that his client had made some contribution towards the purchase of the suit land.

Mr. Kiiru, the learned counsel for the 1st respondent, conceded the appeal on all the grounds. He told us that he agreed entirely with the submissions of the counsel for the appellant. He reminded us that the application for counter-claim was withdrawn before Oguk, J.

In supporting the judgment of the superior court Mr. Njoroge, the learned counsel for the 2nd respondent, submitted that the learned Judge based his decision on the evidence adduced before him taking into account the fact that the appellant was the wife of the 1st respondent. Mr. Njoroge went on to argue that the land transactions had the consent of the *Land Control Board* and that the appellant was not a party to the application before the Land Control Board. As regards the issue of the appellant's claim based on trust, Mr. Njoroge was of the view that the claim was without foundation as there was no allegation of fraud or illegality.

This being a first appeal, it is our duty to re-evaluate the evidence, assess it and reach our own conclusions remembering that we have neither seen nor heard the witnesses hence due allowance must be made for this – see ***SELLE V. ASSOCIATED MOTOR BOAT COMPANY LTD [1968] E.A. 123 at p. 126*** and ***WILLIAMSON DIAMONDS LTD V. BROWN [1970] E.A. 1***. It is for these reasons that we deliberately set out the salient paragraphs of the plaint and the statements of defence.

We have now considered the pleadings and the evidence adduced before the superior court, the submissions of counsel appearing in this appeal and we are of the view that this was indeed a dispute between a wife (appellant) and her husband (1st respondent) and an outsider who is the 2nd respondent, who came in because he purchased part of the land that belonged to the 1st respondent. The undisputed facts were that the piece of land known as Kiganjo/Kiamwangi/856 belonged to the 1st respondent who had a loan with AFC. The 1st respondent fell into arrears of repayments to AFC and as usual AFC wanted to sell the entire parcel in order to recover its money. To save the entire land from being sold, the 1st respondent chose to subdivide the land and sell part of it to the 2nd respondent. The subdivision and sale transactions were effected with the consent of the relevant Land Control Board as per requirement of the relevant law (Land Control Act (Cap. 302 Laws of Kenya)). These transactions of subdivision and sale were not acceptable to the appellant who, as a wife of the 1st respondent, thought that her consent was necessary before the 1st respondent could sell any portions of his land. That indeed was the central point in this litigation that has been going on for a considerable period. The appellant based her claim on trust. This claim was considered by the learned Judge who found it to be baseless. The claim by the appellant that her consent was necessary was properly rejected by the learned Judge who in his judgment

stated:-

“Until recently it has never been the practice and certainly not a legal requirement that before the legal proprietor of a piece of land disposes of it he or she should consult any third party be it his/her husband or wife.”

That being the position, the 1st respondent was perfectly entitled to subdivide his land and sell it to any willing purchaser. The 2nd respondent came in as a purchaser and the transaction was conducted in accordance with the law. No fraud or illegality was pleaded and hence the 2nd respondent ought not to have been dragged into this domestic dispute between a husband (1st respondent) and his wife (appellant). The learned Judge considered all that was placed before him and came to the conclusion that the appellant’s claim was for dismissal. We have considered that evidence, re-evaluated it and have come to the conclusion as did the learned Judge that the appellant’s claim was indeed baseless.

In ***Peters v. Sunday Post [1958] E.A. 424*** at p. 429 Sir Kenneth O’Connor P said:-

“It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”

And in ***Chemagong v. R [1984] KLR 611 at p. 616*** this Court said:-

“A court on appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

We have carefully considered the submissions of counsel appearing for the appellant and the two respondents and apart from our mild surprise at the 1st respondent’s stand to the effect that this appeal should be allowed, we are of the view that the appeal lacks merits.

In view of the foregoing, we order that this appeal be and is hereby dismissed. As regards costs, we order that in view of the circumstances of this case, each party will bear her/his own costs of this appeal.

Dated and delivered at Nairobi this 15th day of May, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is
a true copy of the original.

DEPUTY REGISTRAR