Pitoro v Ouma & another (Environment and Land Appeal 19 of 2021) [2023] KEELC 274 (KLR) (19 January 2023) (Judgment)

Neutral citation: [2023] KEELC 274 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND APPEAL 19 OF 2021

BN OLAO, J

JANUARY 19, 2023

BETWEEN

RACHAEL AUKO PITORO ..... APPELLANT

AND

METHOD OUMA ..... 1ST RESPONDENT

MARIA ADHIAMBO ..... 2ND RESPONDENT

(Being an appeal from the Judgment of Hon. P. Y. Kulecho – Senior Resident Magistrate on 18th October 2021 arising from Busia Chief Magistrte's Court E003 OF 2021)

JUDGMENT

1. Rachel Auko Pitoro (the Appellant herein) moved to the subordinate court at Busia vide Chief Magistrate's Court Elc Case No. E003 of 2021 where through an amended plaint dated 26th February 2021, she sought an order that Method Ouma and Maria Ouma (the 1st and 2nd Respondents respectively) be evicted from the land parcel No. Samia/Buburi/1007 (the suit land) as well as an order for costs. The genesis of her claim was that she is the registered proprietor of the suit land and enjoys all the rights of occupation yet the Respondents who are not her relatives had trespassed thereon and were even planning to inter the remain of one Chris Ouma thereon.

2. The Respondents filed a joint defence dated 30th July 2021 in which they pleaded, *inter alia*, that the suit land was infact owned by the 2nd Respondent's late father who, prior to his death, had allocated ¼ acre thereof to the 2nd Respondent and her son the 1st Respondent where they had lived since 1962 as their only home. However, following the demise of the 2nd Respondent's father, his late brother who was the father-in-law to the Appellant registered the suit land in his name. That the said registration of the suit land in the Appellant's name was so that she could hold it in trust for the family including the Respondents. Particulars of that trust were pleaded in paragraphs 13, 14 and 15 of their counter-claim.

3. The Respondents therefore sought, as per their counter claim, that the Appellant's name be cancelled from the register and the suit land be registered in their joint names. Further, that the suit land be shared equally with the Appellant. They sought the dismissal of the Appellant's claim with costs.

4. The dispute was heard by Hon. P. Y. Kulecho, (senior Resident Magistrate) and in a judgment delivered on 18th October 2021, she made the following disposal orders:

    1. The Appellant's suit be dismissed.

    2. An order for transfer of ¼ acre portion out of the land parcel No. Samia/Buburi/1007 and in particular the exact portion occupied by the two Respondents in favour of Method Ouma and Maria Ouma jointly.

    3. The parties being members of the same family, the court declines to issue any orders as to costs.

5. The Appellant was aggrieved by that judgment and moved to this court on Appeal.

6. I should pause at this point and clarify that whereas the Memorandum of Appeal is dated 8th November 2021, it bears the stamp/seal of the court showing that it was filed on 11th October 2021. Obviously that date cannot be correct for two reasons. Firstly, the judgment being appealed was delivered on 18th October 2021 and therefore, the appeal could not have been filed a week before the judgment in the subordinate court was delivered. Secondly, the Memorandum of Appeal is dated 8th November 2021 and could not therefore have been filed one month before it was drawn. The Deputy Registrar is hereby directed to bring this lapse to the attention of the officer in charge of that Registry. Dates on which court pleadings, are received and filed must be properly captured with the correct court stamp and/or seal because those dates are crucial and if not handled well, could be a cause of great injustice to a party.

7. In her Memorandum of Appeal, the Appellant has raised the following grounds in seeking to set aside that judgement:

    1. That the learned trial magistrate erred in fact and in law in dismissing the Appellant's suit despite un-controverted evidence that the title No. Samia/Buburi/1007 was in the name of the Appellant in trust for her children to the exclusion of anyone else.

    2. That the learned trial magistrate erred in law in failing to uphold the sanctity of title as envisaged by Article 40 of the *Constitution* of Kenya 2010, Sections 24 and 25 of the *Registration of Land Act* hence prejudicing the rights of the Appellant and those of her children.

    3. That the learned trial magistrate erred in fact and in law in failing to appreciate the case before her for determination, in failing further to analyse the evidence adduced in support of the Appellant's claim and thereby arrived at a wrong decision that the Respondent's were entitled to a portion of one quarter acre out of Samia/Buburi/1007 a right the Respondents lacked.

    4. That the learned trial magistrate erred in fact and in law in allowing the counter-claim premised on adverse possession by the Respondent without evidence of such rights accruing to the Respondents or at all.

    5. That the learned trial magistrate erred infact and in law in failing to appreciate that the Respondent had her own title in land parcel No. Samia/Buburi/1006 apportioned to them during succession on mother parcel No. Samia/Buburi/127 and not parcel No. Samia/Buburi/1007.

6. That the learned trial magistrate erred in fact and in law in failing to make a finding that the counter-claim filed by the Respondents was fundamentally defective and could not be sustained for failing to conform to mandatory procedures by not being accompanied by a verifying affidavit, it being a separate claim.

8. The Appellant therefore prayed for the following orders:

1. That the judgement entered against the Appellant in dismissing her claim be set aside and instead his claim be allowed with costs.

2. That the counter-claim filed by the Respondents be dismissed with costs.

3. That the costs of this appeal be paid by the Respondents.

9. When the appeal was placed before Omollo J, the judge directed that it be canvased by way of written submissions.

10. Submissions were subsequently filed both by Mr. Okutta instructed by the firm of Ouma Okutta & Associates, Advocate for the Appellant and by the Respondents who are acting in person. I have considered the record of appeal as well as the submissions filed.

11. This is a first appeal and my duty is to analyse, re-assess the evidence on record and reach my own conclusions in the matter – *Selle v Associated Motor Boat Co.* 1968 E.A. 123 and also *Jabane v Olenja* 1986 KLR 661. The then Court of Appeal for East Africa stated the following as per Sir Kenneth O'connor in the case of *Peters v Sunday Post Limited* 1958 EA 424:

> "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 the 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."

12. This appeal shall be determined in light of the above precedents and others as well as the relevant laws.

13. I shall first consider ground No. 6 where the trial magistrate is faulted for not making a finding that the Respondents' counter-claim was defective and could not be sustained for failure to conform with the mandatory procedure as it was not accompanied by a verifying affidavit. I have perused the record and it is correct that the Respondents' counter-claim was not accompanied by a verifying affidavit. Order 4 Rule 1 (2) of the *Civil Procedure Rules* provide that:

> "The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above." Emphasis mine.
>
> A counter-claim is also subject to the above requirement as provided in Order 4 Rule 1(5) of the *Civil Procedure Rules*. Order 4 Rule 6 of the *Civil Procedure Rules* grants the court the power to strike out a plaint or counter-claim that does not comply with the above requirements. It states:
>
> > "The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule." Emphasis mine.

Superior courts have held that the power to strike out a plaint or counter-claim is not mandatory but it is permissive – see *Research International East Africa Ltd v Julius Arisi & 213 Others* 2005 eKLR. This Court is also guided by the words of Ringera J (as he then was) in the case of *Microsoft Corporation v Mitsumi Computer Garage Ltd & another* 2001 KLR 47 where he said:

> "Rules of procedure are the hand-maiden and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it."

Finally in *D. T. Dobie & Company (k) Ltd v Muchina* 1982 KLR 1, Madan J A (as he then was) said:

> " A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it."

Similarly, as the majority (as per Ouko J A - as he then was) held in *Nicholas Kiptoo Arap Korir Salat v I.E.B.C. & Others* 2013 eKLR (Kiage J.A dissenting):

> " Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."

I think the above captures the scenario in this case very well as the Respondents are acting in person. And although the law applies equally to all parties whether lay or otherwise, Article 159 2(d) of the *Constitution* is also instructive it reads:

> " Justice shall be administered without undue regard to procedural technicalities."

On this issue, Counsel for the Appellant has submitted that:

> " Lastly, we do submit you find that the counter-claim was defective for failing to comply as it was not accompanied by a verifying affidavit, it being a separate claim. The Rules of procedure are enacted not to entertain parties to suit but for orderliness and good conduct of court business. If the requirement was not a must, then the whole of Civil Procedure rules and orders will not be rendered useless."

This court argues with the general principles captured in the above submission. However, as is now clear from the precedents cited above and the law itself, infractions that do not prejudice the other party should not "be elevated to the level of a criminal offence attracting such heavy punishment," such as striking out a pleading. Besides, the law itself provides that striking out a pleading is not mandatory. There is nothing to suggest that the Appellant was prejudiced by the failure of the Respondents to file a verifying affidavit with the counter-claim.

14. It is also clear from the record that the issue of non-compliance with the law as to the filing of a verifying affidavit together with the counter-claim was not raised in the trial court either through the evidence or submissions by counsel. That issue is being raised from the first time in this appeal. In *Alwi A Saggaf B Abed A. Algeredi* 1961 E.A 767 it was held that a new point which had not been pleaded or canvassed in the trial court should not be allowed to be taken on appeal unless the facts, if fully investigated, would have supported it. See *Madhavdi & others v Sardarilal & others* Civil Appeal No. 5 of 1976 (unreported) and also *Visram & Karsan v Bhatt* 1965 E.A 789. Those cases were cited with approval *Thomas Openda v Peter Martin Ahn E. A.* Civil Appeal No. 42 at 1981 [1982 eKLR] where the Court of Appeal said the following on issues raised first on appeal:

> "These are entirely new points, unpleaded and uncanvassed at the trial. No evidence whatsoever was adduced at the trial in relation to these points and we see no justification for allowing them to be raised for the first time on appeal."

The only issue that can be raised for the first time on appeal is one of jurisdiction. In *Floriculture International Ltd v Central Kenya Ltd & Others* 1995 eKLR, the Court held that an issue of jurisdiction can be argued at any time. It said:

> "It has been held in the case of *Kenindia Assurance Ltd v Otiende* 1989 2 KAR 162 that the normal was that a party could not raise for the first time on appeal a point he had failed to raise in the High Court did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction."

It follows therefore that other than the fact that the failure to file a verifying affidavit together with the counter-claim was not in itself sufficient to invalidate the Respondents' claim even if the same had been investigated by the trial court, it is not open to the Appellant to raise it at this point.

15. Ground 6 of the appeal is accordingly dismissed.

16. In regard to No. 4, the trial magistrate is assailed for allowing the Respondents' claim premised on adverse possession without evidence of such rights. Although the Respondents in paragraph 9 of their counter-claim raised this issue of adverse possession, the trial magistrate's judgement made no reference to such a claim. In paragraph 9 of the counter-claim, the Respondents have pleaded thus:

> 9: "The plaintiffs' claim against the defendant is for an order of adverse possession and cancellation of the title to land parcel number Samia/Buburi/1007 on the ground that the defendant has violated her duties as a trustee of the plaintiff."

And in the judgment, the trial magistrate may appear to have considered the claim of adverse possession when at page 4 she states that:

> "It is the defence uncontroverted evidence that they only occupy a quarter an acre of the suit property and have done so since 1962 meaning by the time the plaintiff acquired title to the suit property, the defendants were already in occupation thereof, their right is therefore an overriding interest which is inextinguishable through registration."

However, as will shortly become clear both from the impugned and this judgment, the trial magistrate determined the Respondents' claim on the basis of a trust and not adverse possession.

17. That ground is not well founded and must be rejected.

18. Grounds 1, 2, 3 and 5 will be considered together as they basically challenge the trial magistrate's finding that the Respondents were entitled to ¼ acre out of the suit land in trust and that infact, the trial magistrate ought to have up-held the Appellants title as protected under Article 40 of the *Constitution* and Sections 24 and 25 of the *Land Registration Act*.

19. It is common knowledge that the Appellant is the registered proprietor of the suit land. She holds the title thereto issued on 23rd January 2018. As the registered proprietor of the suit land, the Appellant is entitled to all the rights provided for in the law including the right to evict trespassers therefrom. Section 24 (a) and (b) of the *Land Registration Act* provides that:

    (a) "the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

    (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease."

    Article 40 of the *Constitution* protects the right to property. However, Section 25(2) of the *Land Registration Act* has the following proviso:

    (2) "Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee."

    Case law is replete with decisions of the superior courts to the effect that the registration of land in the name of a party does not relieve him of any duty which he owes another party in trust. In *Kanyi v Muthiora* 1984 KLR 712 which was a claim based on a customary trust, the Court of Appeal said:

    > " The registration of the land in the name of the appellant under the *Registered Land Act* (cap 300) did not extinguish the respondents rights under Kikuyu customary law and neither did it relieve the appellant of her duty or obligation under Section 28 as trustee .... The trustee referred to Section 28 of the act could not be fairly interpreted and applied to exclude a trustee under customary law. If the *Act* had intended to exclude customary land rights, it would have been already so stated."

    See also *Gathiba v Gathiba* 2001 2 EA 342 and *Mbui Mukangu v Gerald Mutwiri Mbui* 2004 eKLR among other cases. And whereas the trial magistrate did not cite any case in her judgment, I have no doubt from the flow of the impugned judgment that she was aware about those precedents. It is always a good practice to cite any relevant precedents where applicable. The registration of the suit land in the name of the Appellant was of course not controverted. Indeed the Respondents did not even attempt to do so. Their case, however, was that the suit land was family land and that the Appellant held ¼ of an acre thereof in trust for them. The Appellant's grievance is that there was no evidence of such trust adduced and that the Respondents infact had their own land being Samia/Buburi/1006 apportioned to them.

20. In *Salesio M'itonga v Mithara & Others* 2015 eKLR, the Court of Appeal stated that trust is a question of fact to be proved by evidence. A court will not imply a trust save in a case of absolute necessity – *Peter Ndungu Njenga v Sophia Watiri Ngungu* 2000 eKLR and also *Juletabi African Adventure Ltd & Another v Christopher Michael Lockley* 2017 eKLR. It was therefrom the duty of the Respondents to

lead evidence to prove that the Appellant held ¼ acre out of the suit land in trust for them. In paragraph 13(a) of their counter-claim, the Respondents pleaded thus:

> " The parcel is ancestral land."

In his statement which he adopted during the trial, the 1st Respondent stated that he was born on the suit land in 1962 and was informed by the 2nd Respondent who is his mother that ¼ out of the suit land had been allocated to her by her father Mangoye Busekeda. On her part, the 2nd Respondent mentioned in his statement that the original land parcel No. Samia/Buburi/127 had been registered in the name of her brother Glasio Aduodi but when he died, the Appellant and one Coleta Khmeta did succession and acquired the same through transmission excluding the Respondents. The certificate of confirmation of Grant issued in the High Court Of Kenya Succession Cause No 152 of 2006 at Nairobi and which is part of the record herein confirms as much. It is instructive to note from the record that the Respondents who testified on 22nd September 2021 were not even cross-examined to test the veracity of their testimony. The only inevitable and irresistible conclusion which the trial magistrate could have arrived at in the circumstances was that the Respondents' evidence that they had lived on the ¼ acre out of the suit land because it was family land given to them by their father and grandfather was correct. There was no evidence to suggest that the suit land or the original land parcel No Samia/Buburi/127 was the Appellant's private property. The evidence that it was family land was never rebutted. She therefore held it in trust for the family. In the case of *Isack M'inanga Kebia v Isaaya Theuri M'intari & Another* 2018 eKLR the Supreme Court held that some of the facts which a court will consider in a claim based on a customary trust include:

1. Whether the land in question was family land.
2. Whether the claimant belongs to such a family, clan or community.
3. The relationship of the claimant to such family, clan or community and whether it is so remote and tenuous as to make the claim idle or adventurous.

In the amended plaint, the Appellant pleaded in paragraph 5 "that she is not related to the defendant in any way." Bearing in mind that the respondent's claim was hinged on the fact that the suit land was family land, it was rather strange that no attempt was made during the plenary hearing to question the Respondents in that claim. And by the time this suit was filed in 2021, the 1st Respondent who was born in 1962 had lived thereon for almost 60 years without any attempt to evict him or the 2nd Respondent. Clearly, the Respondents could not have been strangers to the Appellant as she would have liked the trial court to believe. The Respondents did not plead a customary trust but there is no doubt from their testimony that the plank of the claim was hinged on a customary trust and specifically that the parties were family.

21. In the case of *Odd Jobs v Mubia* 1974 EA 476, it was held that a court may base a decision on an unpleaded issue where it appears from the course taken at the trial that the issue was left to the Court for its decision. And from the trajectory taken by the parties herein, I am satisfied that they left that issue for the court's determination.

22. Other than the claim on a customary trust, there was direct evidence from the confirmed Grant issued in High Court Of Kenya Succession Cause No 152 of 2006 at Nairobi that the original land parcel No Samia/Buburi/127 was transmitted to the Appellant to hold in trust. This is how the confirmed grant reads in respect to the land parcel NO Samia/Buburi/127:

> " Name: Description Share Of

Of Property: Heirs:

Rachel Samia/Buburi/127 5.6ha

Auko Pitoro Hold In

Trust 5 Acres. Holding In Trust."

And on the Title Deed of the suit land, it reads:

> " This is to certify that Rachel Auko Pitori ID NO. xxxxxx (hold in Trust 5 Acres for the Children)."

23. There was no defence filed to the counter-claim nor any evidence led by the Appellant to suggest that the Respondents are not among the children for whom the Appellant holds the 5 acres out of the suit land in trust. All that the Appellant stated during cross-examination by the 2nd Respondent was that:

> " The defendant encroached on the suit land in 2001. She has no right over my land. L.R No 1006 is the entitlement of the defendants. She has no right over LR No 1007."

No evidence was placed before the trial magistrate showing that the Respondents were the registered proprietor of the land parcel Samia/Buburi/1006 or any other parcel of land for that matter.

24. In view of all the above, the trial magistrate cannot be faulted for finding that the Appellant was indeed holding ¼ acre out of the suit land in trust for the Respondents. This is how the trial magistrate resolved the issue:

> " The Court, in light of the foregoing finds that whereas the plaintiff has established on a balance of probability that she is the registered owner of the suit property, the said registration is explicitly as trustee, from the defence evidence, the court infers that the plaintiff holds quarter acre portion thereof in trust for the benefit of the two defendants."

25. From my own evaluation of the evidence that was before the trail magistrate, there is no reason why this court should not uphold that finding.

26. There is only one issue that I need to address in order to bring finality to this dispute. In the penultimate paragraph of the impugned judgment, the trial magistrate made the following disposal orders:

> " The Court dismisses the plaintiff's claim with no order as to costs. The counter-claim is proved and thus allowed as prayed, namely: -
>
> a. That the plaintiff's suit against the 1st and 2nd defendants be dismissed.
>
> b. An order for transfer of the quarter but portion out of the suit property to wit Samia/Buburi/1007, in particular the exact portion occupied by the two defendants in favour of Method Ouma and Maria Ouma jointly."

Taking into account the fact that the Appellant moved to this Court to appeal the decree herein, it is likely that she may resist any attempt to voluntarily execute any transfer documents to facilitate the transfer of ¼ acre out of the suit land to the Respondents. That will leave the Respondents at the mercy

of the Appellant and her successors in title to the suit land. Section 78(1) of the *Civil Procedure Act* provides for the power of the Appellate Court and in sub-section (2) it is stated that:

> "Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."

Having found that the Appellant was a trustee holding ¼ acre out of the suit land in trust for the Respondents, the trial magistrate should have gone further to determine that trust and set a period within which the Appellant should facilitate the transfer of that portion to the Respondents including a default clause. I intend to that shortly.

27. With regard to costs, the parties are family and this court will not interfere with the order on costs.

28. Ultimately therefore and having considered the record in this appeal this court's judgment shall be as hereunder:

    1. The appeal is dismissed.
    2. The Appellant holds ¼ acre out of the land parcel No Samia/Buburi/1007 in trust for the Respondents.
    3. The trust is hereby determined and the Appellant shall within 30 days of this judgment surrender the original title deed to the land parcel No Samia/Buburi/1007 to the Land Registrar Busia for purposes of sub-division and registration of ¼ acre thereof in the joint names of the respondents and she shall also execute all the relevant documents to facilitate that registration.
    4. In default, the Deputy Registrar shall be at liberty to execute all such documents on behalf of the Appellant.
    5. The parties shall meet their own costs.

BOAZ N. OLAO

JUDGE

19TH JANUARY 2023

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUSIA ON THIS 19TH DAY OF JANUARY 2023.

Mr. Mabonga for Mr. Okutta for the Appellant present

Respondents in person – Absent

Court Assistant: Anyasi/Ajuang'

BOAZ N. OLAO

JUDGE

19TH JANUARY 2023