



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO 3 OF 2017

BETWEEN

MELLEN MBERAAPPELLANT

AND

JAMES THEURI WAMBUGU.....RESPONDENT

(An appeal from the judgment of the Environment and Land Court of Kenya at Kisii (Mutungi, J.) dated 30th September 2016

in

ELC Case No 260 of 2012)

JUDGMENT OF J. MOHAMMED, JA

Background

1. **James Theuri Wambugu** (the respondent) sued **Mellen Mbera** (the appellant) in the Land and Environment Court (ELC) at Kisii claiming to be registered owner of the property known as Transmara/Ololchani/863 (the suit property), having been so registered through a land adjudication process in the Ololchani section.

2. The respondent filed a plaint dated 2nd July, 2012 and claimed that in the month of March 2010, the appellant herein encroached onto that property and started to erect structures which resulted in the respondent being denied access and enjoyment of his property. The respondent complained to the area chief and thereafter to Kilgoris Police Station which resulted in the appellant being charged with the offence of forcible detainer in Kilgoris Principal Magistrate's Court Criminal Case Number No 263 of 2010. The appellant was found guilty of the offence and convicted. The respondent therefore filed the suit urging the court to order the appellant's eviction as well as to grant an order of permanent injunction restraining the appellant, either by herself or through her agents from entering or trespassing on the suit property. The respondent also claimed general damages for trespass as well as costs of the suit.

3. In her statement of defence, the appellant denied each and every statement made by the respondent. She claimed that the suit property belonged to her late father, Mochama Ong'ondo and that even if she had been convicted for the offence of forcible detainer, that did not deny her the right to her father's property. She stated that no matter the outcome of the criminal case, the suit property belonged to her deceased father, and as such, she could not have trespassed onto the suit property which the respondent had transferred to himself fraudulently.

4. The respondent gave evidence; stating that he had acquired the suit property through an adjudication process that culminated in the registration of the property in his favour. He produced documentary evidence to this effect and stated that despite the fact that the suit property was registered in his name, the appellant had entered the suit property in March 2010 and refused to vacate. He eventually took the matter up with the police and the appellant and her mother were charged in court and the appellant convicted of the offence of forcible detainer. Even after conviction, the appellant refused to vacate the suit property, prompting the respondent to file suit seeking an order of eviction directed against her.

5. The appellant testified that the suit property, which she described as plot number 2/58 belonged to her late father. She claimed that the structures on the suit property were erected by her late father before he died. She denied that the suit property belonged to the respondent and produced rates demand notes in respect of the suit property and stated that she had been paying rates to the Transmara County Council. Robert Mochama (Robert), the appellant's brother, also testified. He stated that the appellant was resident on plot number 2/58 but denied knowledge of any conviction for forcible detainer in any criminal proceedings.

6. After receiving evidence from the parties, the trial court delivered a judgment in which it held that the respondent was the registered proprietor of suit property, and that the property which the appellant claimed as belonging to her late father and which she described as Plot No 2/58 did not exist as it was not delineated on any map. The learned Judge also relied on the criminal proceedings and the conviction of the appellant, which had not been set aside on appeal, to find that the appellant was unlawfully in occupation of the suit property. The learned Judge rejected the claim for general damages, finding that no basis had been laid for this award, but entered judgment in favour of the respondent ordering the appellant to vacate and deliver vacant possession of the suit property to the respondent within sixty days, and, in default, an eviction order to issue against the appellant. In addition, the court gave an order of permanent injunction restraining the appellant from any dealings with the suit property.

7. The appellant who was aggrieved by the orders, preferred this appeal setting out various grounds which include that: the learned judge erred by failing: to appreciate the provisions of section 18 of the Land Registration Act; failing to find that the appellant had no locus to be sued on behalf of the estate of the deceased; relied on unsupported documents to reach his judgment; failing to properly analyse the evidence; and arriving at a judgment that was manifestly erroneous and amounted to a miscarriage of justice.

8. On the first ground of appeal, the appellant submitted that the trial court failed to appreciate the provisions of section 18 of the Land Registration Act, 2012 which makes it clear that a court cannot entertain an action relating to a boundaries dispute. In the appellant's view, the evidence showed that there were two parcels of land that were in dispute. These were the parcel of land she was claiming – known as Transmara/County Council/2/258 which is registered in the name of her deceased father, and the parcel of land known as Transmara/Ololchani/863 which the respondent was claiming.

9. It was the appellant's claim that, the trial court failed to consider that the registration of the two properties were overlapping and the true owner of the suit property could only have been determined through the process outlined in section 18 of the Land Registration Act. The appellant maintained that the trial court could not have been able to distinguish the exact location of the two parcels of land and could not make a proper determination as to who owns which property without guidance from section 18 of the Land Registration Act. It was the appellant's further contention that the suit was defective as the respondent should have first sought a solution to the boundary dispute, and with this, demonstrated the manner in which he acquired the property. In her view, the fact that this did not happen was an indication that the respondent had the property registered in his name through fraudulent means.

10. In response to this ground of appeal, the respondent urged us to note that this was the first time that the issue of section 18 of the Land Registration Act was being brought up. He urged us to consider that the appellant filed her list of agreed issues for determination before the trial court and at no point did she indicate that the dispute between the parties was a boundary dispute. Submitting that parties are always bound by their pleadings, the respondent contended that the appellant cannot blame the trial court for failing to consider what was not raised in the pleadings or framed for consideration.

11. The respondent further submitted that there was no evidence that the two parcels of land overlapped each other as claimed, or that they even shared a boundary. He urged us to consider that in the criminal proceedings in which the appellant was charged, the allegation that her parcel number, then described as parcel number 2/258, was sharing a boundary with the suit property was rejected. The respondent submitted further that if an appeal was filed against the judgment in the criminal case, the appellant never brought this to the attention of the court, and in any event, an appeal per se does not suspend or operate as a stay of the determination of the court.

12. The respondent averred further that it was the duty of the appellant to prove that section 18 of the Land Registration Act was applicable to the case before the trial court, and prove the existence of the boundary dispute. She failed to do this; and could now not raise it in her submissions which is neither evidence nor pleadings.

13. It is beyond question that parties are bound by their own pleadings. This Court in David Sironga Ole Tukai v Francis Arap Muge & 2 Others (2014) eKLR held that:

“The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice. (emphasis ours)

14. I agree with the respondent’s assertion that the appellant never raised the issue of a boundary dispute between her and the appellant. In fact, her defence sets out the grounds upon which she opposed the suit, and this included claims that the suit property belonged to her father, that she was not a trespasser and the registration of the suit property in the name of the respondent had been done through fraud.

15. Having failed to raise the issue of a boundary dispute at the trial court, the respondent cannot fault the trial court for failing to consider it. I am fortified in this finding by the sentiments of this Court in David Sironga Ole Tukai v Francis Arap Muge & 2 Others (supra) that:-

“[i]t is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense”

This ground of appeal therefore fails.

16. The appellant claimed that the registration of the property in the name of the respondent was procured through fraud. The respondent on his part submitted that the process of adjudication that led to him being registered as the owner of the suit property was proper, and stated that neither the appellant nor her father ever objected to his being allotted the suit property during the process of adjudication. Moreover, there was no evidence of any fraud on the part of the respondent. It is trite law that any allegations of fraud must be pleaded and proved. In *Vijay Morjaria v Nansing Madhusingh Darbar & Others [2000] eKLR (Civil Appeal No 106 of 2000)* Tunoi JA rendered himself on this issue as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

17. In *Nyangate Guto alias Watson Mogere Mogoko v. Maxwell Okemwa Mogoro & National Bank of Kenya Ltd*, this Court stated as follows regarding the standard of proof required in instances where fraud is alleged:

“8. As they are serious allegations, the onus is on the party alleging fraud to provide evidence to the court that rises to the standard of proof which was underscored by this Court in Central Bank of Kenya Ltd vs. Trust Bank Limited & 4 others [1991] eKLR Civil Appeal No. 215 of 1996) as being beyond that of a balance of probabilities. In that appeal, the court rendered itself as follows:-

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

See: *Nancy Kahoya Amadiva V. Expert Credit Limited and another [2015] eKLR.*

18. Order 2 Rule 10 of the Civil Procedure Rules, 2010 requires that every pleading shall contain particulars of any fraud that the party intends to rely on. It is clear that the respondent merely made an assertion claiming that the respondent fraudulently procured registration of the suit property in his name, but failed to indicate to the court what the particulars of the fraud were. In the result, I am constrained to find, like the trial court did, that there was no basis to show that the title document was unlawfully issued to the respondent and as such her allegations of fraud were neither properly pleaded nor proved.

19. I have also considered whether the appellant should have been sued on behalf of the estate of her deceased father, Mochama Ongondo instead of being sued in her own capacity. The appellant submitted that since the property in question belonged to her deceased father, and she was resident on the property as a beneficiary to his estate, the proceedings against her should have been instituted as a legal representative of the deceased, and not in her personal capacity. The respondent submitted that this was a baseless allegation as he made the claim against the appellant since she was the one who trespassed onto his property and was the one convicted for being unlawfully on the suit property.

20. I agree. The appellant did not demonstrate that the suit property belonged to her deceased father. She produced a demand note for ground rent in respect of rates payment for plot number 2/58 which was dated 5th October 2012 in the name of her deceased father. However, this was not an indication that her father was the true owner of the suit property and we agree with the trial court's sentiments that:

“The defendant has not shown that she is in occupation of the suit property as a beneficiary of her deceased father. There is absolutely no evidence pointing to the defendant’s deceased father as having been the owner of Plot No 863 Ololchani. The evidence by the defendant is that her father owned Plot No 2/58 Kilgoris Town which cannot be the same as Plot No 863 Ololchani which the plaintiff acquired through land adjudication.”

21. The appellant’s final submission was that the trial court failed to evaluate the entire evidence placed before him. On this, the appellant submitted that the trial court failed to appreciate that the appellant could not have been sued in her name, and further that the respondent failed to produce the land adjudication record as required in law. She further contended that the trial court failed to appreciate the evidence of the clan elder who assisted the deceased purchase the suit property and build on it. The appellant submitted that the trial court did not have occasion to record the evidence of the respondent and therefore failed to appreciate the evidence placed before him. In response to this ground, the respondent submitted that he produced various documents before the court all of which were admitted by the court and which served to prove his case.

22. I have carefully considered this submission alongside the record of appeal. The respondent’s testimony set out the circumstances under which he came to be the registered proprietor of the suit property. he testified that an adjudication process in Transmara County begun in 1984 and ended on 1st February 2006 when he was informed by the adjudication officers that the suit property had been adjudicated in his favor. He produced documents to this effect, and showed that thereafter, he was registered as proprietor of the suit property and obtained title on 19th October 2010. The respondent was the first registered owner of the property and his title is indefeasible unless the circumstances in section 25 and 26 of the Land Registration Act are complied with. The rights of a first proprietor acquired on first registration are indefeasible under Section 25(1) of the Land Registration Act which provides that:

Rights of a proprietor.

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act,...

23. Further to this, section 26(1) of the Land Registration Act provides that a certificate of title is evidence of ownership by the person named therein as the proprietor, and provides the circumstances under which such a title may be defeated. That section reads as follows:

Certificate of title to be held as conclusive evidence of proprietorship.

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

24. As I have noted herein above, the appellant failed to show that the respondent had secured registration of the suit property through fraudulent means. Even in the evidence led in support of her case, the appellant simply stated that her father’s property was parcel number 2/58 and that she had occupied the same as his beneficiary. Her younger brother Robert reiterated that the appellant was in occupation of plot number 2/58. This evidence did nothing to cast doubt as to the respondent’s ownership of the suit

property.

25. This Court's duty on a first appeal was repeated in *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR (Civil Appeal No. 161 of 1999)* in the following manner:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

I have re-evaluated and re-analysed the evidence led before the trial court and our analysis of the evidence shows that the respondent proved his case to the required standard, and that the learned judge was therefore right in rejecting the defence of the appellant. Thus, this appeal has no merit and I hereby order it dismissed with costs to the respondent. The orders made by Mutungi J. shall therefore stand and take effect from the date of this judgment.

Dated and Delivered at Nairobi this 3rd day of April, 2020

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

JUDGMENT OF OKWENGU, JA

I have read in draft the judgment of J. Mohammed, JA. I concur that this appeal has no merit. The learned Judge of the Environment and Land Court properly identified and addressed the issues. The appellant failed to prove her allegations of fraud, nor did she prove that the suit property belonged to her deceased father.

I am in agreement with the analysis and reasoning of J. Mohammed, JA and have nothing further to add.

The appeal is therefore dismissed with costs.

This judgment is delivered in accordance with **Rule 32(3)** of the Court Rules.

DATED and delivered at Nairobi this 3rd day of April, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL



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