



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

FAMILY APPEAL NO E011 OF 2021

JEREMIAH MGHANGA MSAFARI.....APPELLANT

VERSUS

1.MILLICENT ZIGHE MWACHALA

2.CHRISPUS MWACHALA PAKA

3. LANDS REGISTRAR –WUNDANYI

4. TRUSTEES OF THE ASSOCIATION OF

JEHOOVA’S WITNESS(EA).....RESPONDENTS

(Being an appeal from the ruling and orders of honourable Khaboya S.Benson (pm) delivered on 8th April 2021 In Taveta pm’s court civil case number No. 10 of 2019)

JUDGMENT

1. Vide an undated plaint filed before Taveta SRM court on 3rd September 2019, Millicent Zighe Mwachala(plaintiff) claiming to be a wife to Chrispus Mwachala (1st defendant), commenced proceedings against her husband alleging that he had without her consent and that of the entire family sold part of the family land known as Taita/Taveta/Kimala Mata/459 to the second defendant at a sum of kshs 400,000/= . That the sale was contrary to a family agreement entered between the 1st defendant and other family members that he could not sell the property without their consent. That despite lodging a caution against the said land, the Land Registrar Wundanyi(3rd defendant) without notice to her did remove the said caution thus exposing the land to purchasers.

2. The plaintiff therefore prayed for a declaratory order that the said property measuring about five Acres formed part of matrimonial property; a permanent injunction restraining the defendants either themselves or through their agents/servants or employees from transferring, constructing, selling, charging, sub-dividing, taking possession, or otherwise dealing in any manner with property known as Taita Taveta/Kimala Mata/459.

3. On 12th September 2019, the 1st defendant filed his defence stating that; the suit had no legal basis, was baseless, vexatious, frivolous and filed in bad faith without notice hence abuse of the court process. He further stated that he separated with the plaintiff 30 years ago and that the property in question was acquired after they had separated hence the same could not qualify to be matrimonial property.

4. On 25th August 2020, the plaintiff filed an amended plaint dated 10th August 2020 claiming that the 1st defendant was in the process of disposing of family properties among them; Taita Taveta./Kimala Mata/1937 and 459, Kimorigo/Mboghoni/137 and Starehe Kamili/Mwanza Ngombe Allotment no.75 without her consent and that of the second wife plus other family members. She prayed for declaratory orders that the said properties formed part of matrimonial property and that an injunction to issue prohibiting any disposal and or dealings with the said properties.

5. The 3rd respondent filed their defence also on 25th August 2020 claiming that the caution lodged by the plaintiff was removed after the 1st defendant wrote a letter requesting for its removal and that the plaintiff having failed to respond to the notice issued by the Registrar to file any objection, the same was procedurally removed.

6. Upon hearing the suit, the honourable court delivered its judgment on 12th November 2020 thus allowing the prayers sought after finding that the suit properties constituted matrimonial property with the plaintiff having an equitable beneficial interest thereof hence an overriding interest.

7. Subsequently, one Jeremiah Mghanga Msafari filed a notice of motion dated 10th Dec. 2020 seeking; stay of execution of the decree issued on 11th Nov.2020 pending hearing and determination of the application; to be granted leave to join in the suit; the judgment entered on 12th Nov.2020 be reviewed and the orders issued therein together with consequential orders be set aside; to be granted leave to file pleadings as well as any such documents that he deems fit to support his claim over the suit property; the suit be heard *denovo* and costs of the suit.

8. The application was supported by grounds stated on the face of it and averments contained in the affidavit in support sworn by the applicant on 10th Dec.2020. He deposed that he was the registered owner of L.R. No. Kimorigo/Mboghoni/137 having bought it from the 1st defendant at Kshs 650,000/=. That he was a bonafide purchaser for value after carrying out necessary due diligence including doing search and enquiring from neighbours to the seller who confirmed availability of the land for sale hence followed all legally recognized procedures before acquiring registration and ownership.

9. In response, the plaintiff/ Respondent filed a replying affidavit sworn on 17th December 2020 deposing that the applicant (intended interested party) did not carry out due diligence from neighbours nor local chief as they were all aware of the dispute which even the chief had mediated over but in vain. That on 23rd December 2020 when the applicant was buying the property, he was aware of the existence of the court proceedings but chose to ignore. She averred that her daughter Elizabeth did communicate with the applicant after getting his cell phone no 0728075919 from his uncle hence warned him against buying the said land. She contended that the applicant having not developed the land, he will not suffer any prejudice by claiming a refund of his money from the 1st defendant.

10. After length submissions, the learned magistrate dismissed the application in his ruling dated 8th April 2021 on grounds that; the court had become *functus officio*; the applicant was aware of the court proceedings but chose to stay away hence cannot claim innocence; the applicant did not qualify as an interested party as he was asserting a claim over ownership of property which claim demands participation as a principal party and that, the 1st Defendant was aware of a consent recorded in court that he was not supposed to sell any piece of land during the pendency of the proceedings.

11. Aggrieved by the said ruling, the applicant moved to this court through a memorandum of appeal dated 15th April 2021 citing 12 grounds but which can be summarised as follows; that the learned magistrate erred in law by; failing to recognize that the appellant was entitled to a right to hearing hence condemned him unheard; proceeding to make a judgment altering a title deed No. Kimorigo /Mboghoni/137 without requiring its production; allowing introduction of an amended plaint after close of the pleadings without leave of the court being sought; not recognizing that the subject title was inherited land and not matrimonial property; allowing amendment of the plaint without joinder of the appellant; not recognizing and considering a supplementary affidavit of the appellant sworn on 17th December 2020 in response to the 1st respondent's replying affidavit; finding that the appellant was fully aware of the subject proceedings; holding that the court was *functus officio* and, that the ruling was not supported by law or evidence.

12. Simultaneously filed with the memorandum of appeal is the notice of motion of even date seeking to injunct any dealings on the subject property pending the hearing and determination of the appeal. On the 22nd May 2021, parties agreed on compromising the application in favour of the appeal. They also agreed on filing submissions in disposition of the appeal.

Appellant's submissions

13. Through the firm of Muriithi and Masore Advocates, the appellant filed his submissions on 5th May 2021 reiterating the grounds of appeal in entirety. Mr. Masore contended that the appellant was not involved in the entire proceedings despite being the registered owner of the subject property. That in spite of filing an amended plaint introducing the land in question, none of the defendants ever amended their defence in response to the newly introduced title deeds. That the appellant only came to know of the subject proceedings when he was served with a copy of the decree.

14. Learned counsel contended that the learned magistrate failed to apply the principles applied in the case of **Elton Homes Vs Davis & others (2019)e KLR** which was cited as an authority for consideration where the court ordered a case to start denovo in circumstances similar to this case. Mr. Masore opined that the learned magistrate failed to properly apply O21 R6 of the civil procedure rules which requires production of a title deed for cancellation where the same has been altered.

15. Counsel extensively submitted on the question of what constitutes matrimonial property under the Matrimonial Property Act thus citing various authorities thereby contending that the subject property was ancestral land and not matrimonial property as claimed by the 1st respondent. That the right to be heard is an inalienable right which cannot be taken away hence any decision purporting to take it away is null and void. To buttress this proposition, counsel referred to the holding in the case of **Aisha Motors Vs Wanza (2019)e KLR**.

16. Regarding the question whether the appellant was aware of the proceedings, Mr. Masore asserted that the 1st respondent's claim that the appellant was made aware through her daughter (1st respondent) is hearsay evidence. That there was no return of service filed to that effect. As to whether the court had become functus officio, counsel submitted that an application and an order for review for joinder as an interested party can be made at any stage when the affected party becomes aware of the proceedings and that it is the appellant's right to be heard.

1st Respondent's submissions

17. Through the firm of Nyange Sharia and company advocates, the 1st respondent filed her submissions on 26th May 2021. Mr. Nyange submitted that the trial court properly exercised its discretion and therefore the appellate court cannot fault it as; it correctly applied the relevant principles, did not misdirect itself nor misapprehend the law and that it took into account what it was supposed to and what it was not supposed to do. To support this position, reliance was placed in the case of **united India insurance Co. Ltd V V.East AfricaN Underwriters(Kenya) Ltd(1985)E.A.898**.

18. Concerning the question of non-joinder of the appellant as a party, counsel submitted that the applicant could not be enjoined as an interested party as he was claiming ownership. Counsel posed the question as to what documents will the appellant file should the court allow him to participate. That the moment the joinder application is dismissed, the rest of the prayers will automatically fail. Learned counsel contended that before setting aside the impugned orders, the court must be satisfied whether there is a draft defence raising serious triable issues. In support of their case, counsel attached various authorities for consideration inter alia; **Republic vs kenya National Highways Authority and Marigat Group Ranch &3 others vs Wesley Chepkoiment and 19 others**.

Analysis and determination

19. This is a first appeal from the decision of a magistrate's court sitting as a court of first instance. It has severally been held in a majority of judicial precedents that as a court exercising first appellate jurisdiction, am duty bound to re-evaluate, re-asses, reconsider and therefore arrive at an independent determination, conclusion or finding bearing in mind that I did not have the advantage of listening to or seeing the witnesses to be able to assess their demeanour.

20. The above position was succinctly captured in the case of **Selle and another Vs Associated Motor Board Company Limited &Others(1968) EA123** where the court held that;

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court...is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance on this respect...”

21. It is common ground that the suit before the magistrate's court as originally instituted was against the 2nd, 3rd and 4th respondents. It is also not in dispute that the appellant herein did not participate in those proceedings. The appellant allegedly came to the picture long after judgment had been delivered. This was through service of a decree effected upon him by the area chief. Equally, it is a fact that, by the time the said judgment was delivered, the appellant was the registered owner of L.R Kimorigo/Mboghoni/137 the subject of this appeal. Apparently, none of the original defendants (2nd, 3rd, and 4th respondents) ever challenged the decision of the lower court.

22. Having considered the proceedings before the lower court, grounds of appeal and rival submissions by both counsel, issues that crystalize for determination are; whether the appellant was aware of the subject proceedings before the lower court and, whether he was entitled to be enjoined as an interested party. I have narrowed down the grounds of appeal to two because, this is what is relevant in this appeal. The rest of the grounds are basically touching on the second respondent who did not appeal nor participate in this appeal and also issues relating to whether the property in question is matrimonial property or not an issue I do not find relevant in this appeal. To discuss the status of the property at this stage will prejudice the likely outcome of the case in case a retrial is ordered. I will therefore conveniently avoid addressing that particular subject.

23. Concerning whether the appellant was aware of the proceedings, the 1st respondent claimed in her replying affidavit sworn on the 17th December 2020 in response to the joinder application that her daughter told her that she had informed the appellant through his cell phone of the pending proceedings. The honourable magistrate took this averment as a confirmation and proof that the appellant was aware of the proceedings. He also found that the 1st respondent's averment was not controverted. However, Mr. Masore countered the learned magistrate's expression by referring to the appellant's supplementary affidavit sworn on 17th December 2020 where the appellant denied having any knowledge over the existence of the suit nor engaging in any communication to that effect.

24. A perusal of the said supplementary affidavit at para.10 reveals that the appellant had denied having had any communication with anybody regarding the existence of the said proceedings. By all means, this was a rebuttal which the learned magistrate did not refer to. Further, the claim that it was her daughter who informed her that she had communicated with the appellant cannot be any better than hearsay evidence which is not admissible in law. The daughter did not testify nor swear any affidavit to confirm the alleged communication. Besides, there is no evidence whether by way of return of service or otherwise that the appellant was aware of the proceedings. Although one might argue that the 2nd respondent ought to have revealed to the appellant of the pending proceedings, it is also possible that the 2nd respondent may have kept it as a secret with the intention of getting money.

25. Therefore, the allegation that there was a consent agreement between the 2nd respondent and the 1st respondent that the 2nd respondent was not to sell any portion of the disputed property until the matter was finalized was binding to the consenting parties. There was no proof that the appellant was aware of the said consent and therefore ignored. It is trite that he who alleges must prove. See **Kipkebe Limited vs Peterson ondieki Tai(2016)e KLR** where the court held that he who asserts must prove his case. In a nut shell, I do agree with the appellant that he had no knowledge of the existence of the subject suit and therefore cannot be accused of squandering the opportunity to be heard. To that extent, I do find that the trial magistrate erred in holding that the appellant was aware of the court proceedings by the time he bought the subject land.

26. Having held as above, I will now turn to the most contested issue on joinder. Parties engaged in a vicious argument on whether the appellant properly approached the court by seeking a review order to set aside the judgment and be enjoined as an interested party. Who is an interested party and at what stage can joinder of an interested party be entertained" According to the Black's Law Dictionary, 9th Edition a "Necessary Party" is defined as;

"A party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings"

27. The Black Law Dictionary, 9th Edition at page 1232 further defines an interested party as; "***A party who has a recognizable stake (and therefore standing) in the matter'***". Whereas the Civil Procedure Act, Cap 21 is silent on the subject as to who is an "***interested party***", Order 41 Rule 5 of the Civil Procedure Rules 2010, does make a reference to the term "***interested party***" and states as follows;

"The court may either on its own motion or on application by any interested party, remove a receiver appointed pursuant to this order on such terms as it thinks fit"

28. Besides, reference to the word “interested party” can also be traced to the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, Legal Notice No. 117 of 2013, which defines an interested party as;

“A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation”

29. In Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR, Mativo. J. explained circumstances when an interested party ought to be enjoined in a proceeding. He stated thus;

“A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty”.

30. In the case of Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [2014] eKLR the Supreme Court of Kenya held that;

*“[22] In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the **Mumo Matemo** case where the Court (at paragraphs 14 and 18) held:*

“[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

31. Similarly, in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

“(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) joinder to prevent a likely course of proliferated litigation.”

32. From the above quoted provisions and case law, it is not correct for Mr. Nyange to claim that there is no provision known in law that provides for an interested party more so after judgment has been delivered. In the case of Elton Homes vs Davis & others (2019)e KLR, the court allowed joinder of an interested party after judgment had been entered between two principals without involving him yet he was in occupation of the property from which he was being evicted. The court recognized that the intended interest party had a constitutional right to be heard; The court observed that;

“ the constitution of Kenya is very clear on the right to protection of ones property and the said property cannot be arbitrary(sic) be taken away from such an owner without being heard or accorded an opportunity to ventilate his case”

33. It is trite that joinder of an interested party is meant to safeguard parties who may otherwise be ignored or side lined by a malicious party/s with the sole purpose of disenfranchising a party's inalienable right of being heard before being condemned. Further, it is cost saving as it avoids multiple suits when one suit can solve the claim once and for all. It is my finding that the appellant is entitled to a hearing as an interested party being the registered owner of the property in question. His claim should not be dismissed prematurely by being denied the right of hearing. There is no greater prejudice in starting the case denovo than denying the appellant the right to be heard.

34. Having held as above, I am satisfied that the appeal herein is merited and the same is allowed with orders that the ruling dated 8th April 2021 is substituted with the order that the appellant's application dated 10th December, 2020 is allowed in its entirety and that the suit shall start denovo before any other magistrate with competent jurisdiction other than Hon. B. Khaboya and in the absence of one within Taveta law courts, the same to be heard before any competent magistrate with jurisdiction in Voi law courts. Regarding costs, each party shall bear own costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF DECEMBER 2021

J.N.ONYIEGO

JUDGE



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