



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO. 103 'B' OF 2008

NGARUNI GITONGAPLAINTIFF

VERSUS

FRANCIS KOBIA MAILU.....DEFENDANT

J U D G E M E N T

(Being an Appeal against the Ruling of the Ag. Senior Resident Magistrate in Maua SPMCC No. 78 of 2008 delivered on the 8th day of October, 2007).

1. This appeal has the following grounds of appeal:-

- 1. The Learned Senior Resident Magistrate erred in law and in fact in striking out the plaint for lack of jurisdiction while the Court had Jurisdiction to hear and determine the case.***
- 2. The Learned Senior Resident Magistrate erred in Law and in fact in arriving at a decision contrary to law and evidence on record.***
- 3. The Learned Senior Resident Magistrate erred in law and in fact in finding that the dispute falls within the jurisdiction of the Land Disputes Tribunal.***

2. Predicated upon the above grounds, the Appellant prays that the lower Courts decision be set aside with costs and that the lower Court be ordered to proceed with the hearing and determination of the suit on its merits.

3. The appellant proffers what to him is a conspectus of the history of this suit. He says that he is the registered owner of Land parcel No.. NYAMBENE/KIRINDINE "A" /2482. He explains that in his plaint he had elaborated that he had been in continuous ownership, possession and use of his land. He had developed his land by constructing a house on it and had planted banana stems, sugar cane, trees coffee, Miraa and pineapples. He says that he had also practiced food crop farming thereon.

4. The appellant says that in his plaint he had explained that the respondent had unlawfully and/or without any justifiable reason or cause started interfering with his use and possession of the suit land and that he had embarked on chasing away the appellant's workers from the land had started harvesting the appellants crops and was attempting to take possession thereof.

5. The appellant says that in his defence, the respondent had pleaded that he was in possession of the land and this line of defence was evidence that ownership of the suit land is in dispute. He says that the respondent raised no issue of trespass in his defence and argues that the lower Court should not have used this ground to find that it did not have jurisdiction to hear and determine the suit.

6. The Appellant submits that since he had title to the disputed land, the lower Court erred in finding that the dispute should be handled under the now repealed Land Disputes Tribunals Act, which according to him, was not allowed by the law. The appellant, therefore, laconically submitted that a Land Disputes Tribunal lacked Jurisdiction to handle the apposite dispute for the reason that he was in possession of a title deed to the land in dispute. He strongly opines that the lower Court's finding was unlawful and contrary to Written law and, ipso facto, deserved to be overturned.

7. The appellant proffered the following cases in support of his propositions.

1. Msambweni Land Disputes Tribunal and Another Versus Bakari Ali Mwakumanya exparte Diana Muthoni (2014) e KLR.

2. Republic Versus Provincial Appeals Committee and 6 others exparte Peter Gatimu Kanyoro (2014) e KLR

8. The respondent submits that the lower court had no jurisdiction to hear the suit whose ruling has spawned this appeal and refers the Court to Section 3 (1) of the Land Disputes Tribunals Act which states as follows:

“3(1) Subject to this Act, all cases of a Civil nature involving a dispute as to:-

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land,

Shall be heard and determined by a Tribunal established under Section 4”.

8. The respondent says that paragraph 4,5,6 and 7 of the Plaintiff stated that the defendant had indeed entered into the plaintiff's land and occupied the same and started utilizing the same. He says that the fact that the Appellant, who is the Plaintiff in the lower Court, had sought an order for eviction and permanent injunction shows that the Plaintiff was utilizing the land and was in occupation. According to him, this was evidence enough that what was primarily in contention was trespass to land.

9. The respondent has further submitted that the Blacks Law Dictionary defined occupation as: “possession, control or use of real property. “He has also submitted that the same dictionary defined trespass as follows:’ “an unlawful act committed against the person or property of another, especially wrongful entry on another's real property”.

10. The respondent concludes that at the time the suit that spawned this appeal was being heard in the lower Court, only the Land Disputes Tribunal could have entertained a claim for occupation and trespass to land. He concluded that the trial Magistrate was right in holding that the Court lacked jurisdiction.

11. Each case has its particularities and no facts will perfectly echo the facts of another case. The case of Msambweni Land Disputes Tribunal (Supra) proffered as an authority by the appellant, among other things challenged the decision of the Msambweni Land Disputes Tribunal dated 8th November, 2011 after the law establishing tribunals had been repealed. The Court found that the interested party had filed his case on 3rd May, 2011, 18 ½ years after a title had been issued to Diana Muthoni Muturi, the applicant in the case. The Court held that the limitation period had come into play and that the elders had no jurisdiction as the apposite issues could have only been adjudicated upon by a Court of Competent jurisdiction if the apposite title had to be challenged.

12. In the plaintiff in the suit that spawned this appeal, the Plaintiff, who is the present appellant, prays for judgment against the defendant for:-

(a) An order of Eviction and a permanent injunction as prayed for in paragraph 7 of the plaint .

(b) Costs of the suit

(c) Any other or better relief the Court may deem fit to grant.

13. Both the authorities proffered by the appellant seem to rely on Section 159 of the defunct Registered Land Act for the assertion that the defunct Land Disputes Tribunals had no jurisdiction to arbitrate in matters where what was in dispute was titled land. The case of Msambweni Land Disputes Tribunal (Supra) quoted with approval the case of Jidraph Nyoro Kangethe Versus Silas Kangethe e KLR as having opined as follows:-

“The jurisdiction of the Tribunal to deal with land registered under the Registered Land Act (cap. 300) is found in Section 159 of the Act. That jurisdiction is limited by section 3(1) of LDT ACT No. 18 of 1990 which provides for cases which may be heard and determined by the tribunal.

“These are cases of a civil nature involving disputes as to:

(a) the division of boundaries to land held in common.

(b) A claim to occupy or work on land or

(c) trespass to land.

“ These are the only matters which the tribunal had power to deal with. Act No. 18 of 1990 does not confer upon the Tribunal Power to interfere with the interest of a registered proprietor whose title is protected by Sections 27 and 28 of Cap 300.”

14. The case of Republic Versus Provincial Appeals Committee & 6 others exparte Kanyoro (op.cit) also says that Section 159 of the Registered Land Act decrees that cases where the land in dispute has titles can only be tried by the High Court or the Resident Magistrate's Courts depending on the pecuniary jurisdiction.

15. With utmost respect, I beg to differ. Revenantly, so that Section 159 of the Registered Land Act, may be placed in perspective and be quoted in its words, I reproduce it here below:-

“ S 159 : Civil suits and proceedings relating to the title to, or the possession of, land or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matter in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or where the dispute comes within the provisions of section 3(1) of the Land Disputes Tribunal Act , in accordance with that Act (emphasis mine)”.

16. It is self-explanatory that the defunct Land Disputes Tribunals had jurisdiction to handle disputes involving land which had titles in appropriate circumstances. I therefore do not agree with the appellant's Submissions in this respect.

17. Section 3(9) of the Land Disputes Tribunals Act states as follows: -

“ Notwithstanding any other Written Law, no Magistrate's Court shall have or exercise jurisdiction or powers in cases involving any issue set out in paragraphs (a) to (c) of subsection (1).

18. The lower Court presumably based its decision on the provisions of Section 3 (9) of the Land

Disputes Tribunals Act. However, the Substantive prayer in the appellants' plaint prays for an order of eviction and a permanent injunction. I opine that for a Court to grant an order of eviction, it is duty bound to establish the ownership of the disputed land. This goes beyond the mere issues of occupation and trespass. Ownership of registered land can only be determined by a Court seized of competent jurisdiction. This would require hearing of evidence in accordance with the Civil Procedure Rules which activity the elders envisaged by Section 2 of the Land Disputes Tribunals Act are not competent to do. For this reason, I am inclined to find that the lower Court had Jurisdiction to hear the dispute in SPMCC No. 78 of 2008. I will allow the appeal.

19. I am intrigued by the respondents' reference to the Black Law Dictionary as defining trespass as: "An unlawful act committed against the person or property of another, especially wrongful entry on another's real property". When one juxtaposes this with the respondent's Submission that it is "clear beyond peradventure that the Plaintiff's claim squarely falls into occupation and trespass and at the particular time only the land Disputes Tribunal could entertain such a claim". I do not know whether or not the respondent is admitting that he may have committed an unlawful act against the property of another and "especially wrong entry on another's real property."

20. As I have said, **I allow the appeal. As I have found that the lower Court has jurisdiction to hear and determine the suit in SPMCC 78 of 2008 at Maua, I set aside the opposite ruling of the lower Court and order that the lower Court proceeds with no undue delay to hear and determine the suit.**

21. In this appeal, costs shall follow the event. I award costs to the appellant.

22. It is so ordered.

DELIVERED IN OPEN COURT AT MERU THIS 20TH DAY OF APRIL, 2016 IN THE PRESENCE OF:-

CC: Daniel /Lilian

Edwin Kimathi h/b Kaimenyi for the Appellant

Ken Muriuki for the Respondent.

P.M NJOROGE

JUDGE