



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC APPEAL NO E003 OF 2021

JACOB NJERU KARUKU.....APPELLANT

VERSUS

NJAGI NJUGUNA.....RESPONDENT

(Being an appeal from the Ruling and order of the Honourable Njoki Kahara SRM delivered on the 8th April, 2021 in Chuka LDT 15 OF 2009).

JUDGEMENT

1. The appellant JACOB NJERU KARUKU filed this appeal against the Ruling of Hon. Njoki Kahara, Senior Resident Magistrate delivered on the **8th April, 2021** in Chuka LDT 15 of 2009 and set out the following 8 grounds of appeal:

- i) THE Learned Magistrate erred in Law and in fact and arrived at a decision against the weight of evidence before her.
- ii) THE Learned Magistrate erred in fact and Law in finding that the Respondent herein had proved her case against the Appellants on a balance of probabilities and in holding that the Appellant to vacate the suit property.
- iii) THE Learned Magistrate erred in Law and fact and misdirected herself on the Law and applicable case law for ordering an eviction. In fact, the learned magistrate completely failed to give reasons for her determination against clear principles on what should constitute a ruling.
- iv) THE Ruling delivered by the learned magistrate was devoid of any points for consideration by the Court, points for determination and reasons for the said decision in contravention to mandatory requirements of order 21 rule 4 of the Civil Procedure Rules, 2010.
- v) THE Learned Magistrate erred in Law and fact in failing to take into consideration the Appellants Submission as she deliberately failed to render herself on the same while the Appellants had filed and served their written submissions.
- vi) THE Learned Magistrate erred in Law and fact in ignoring the established principles on matters touching on Land Disputes Tribunal and their adoptions thereof and in particular, she failed to ensure the principles on adoption of awards from land dispute tribunals are well met before the same is adopted and enforced.
- vii) THE Learned Magistrate erred in Law and in fact by failing to consider the Appellants' case especially its written submissions and proceeded to issue the eviction orders on a flimsy ground that a pending appeal by the Appellant was dismissed and consequently the ruling therein was to be in favour of the Respondent. The Learned magistrate therefore did not determine the matter before her on merits.
- viii) THAT the Learned Magistrate erred in Law and in fact when she arrived at an Award that is inordinately and manifestly excessive in the circumstances.

2. The Appellant prays for the following orders:

- i. This Appeal be allowed in its entirety.
- ii. The Ruling and Decision delivered by the Learned Magistrate Court be varied and/or set aside.
- iii. The Respondent be condemned to pay the Costs of this Appeal and the Appellant's costs in the Court below.

BACKGROUND OF THE APPEAL

3. The appeal is in regard to the Ruling of the learned trial magistrate arising from an application dated **5th October, 2020** in which the Respondent herein sought for orders that:

1. That for reasons set out in the certificate of urgency herewith filed, the court be pleased to certify the instant application as urgent and service of the same be dispensed with in the first instance.
2. That the Defendant/Respondent, his agents, servants, assignees and or any other person acting on their behest be ordered to vacate the Plaintiff/Applicant's suit land as earmarked and beacons by the Land Dispute Tribunal in Igambang'ombe LDT No. 4 of 2008 school and in default, the Defendant/Respondent be forcefully evicted.
3. That the Officer-in-Charge Kamwimbi Police Post be served with these orders for compliance.
4. Costs of this application be provided for.

4. The said application was supported by the affidavit of NJAGI NJUGUNA and premised on the grounds on the face of the motion.

5. In opposing the application, the Defendant/Respondent filed a replying affidavit sworn on **27th October, 2020**.

6. After considering the application, the affidavit in support and against as well as the submissions by both parties, the trial magistrate found merit in the said application and allowed the same. The learned trial magistrate ordered the Appellant herein to vacate the Respondent's suit land as earmarked and beacons by the Land Dispute Tribunal Igambang'ombe **LDT No. 4 of 2008** school within 60 days and in default to be forcefully evicted. Being dissatisfied with the said ruling, the Appellant filed this appeal.

SUBMISSIONS

7. The appeal was canvassed by way of written submissions which were duly filed by the Appellant and Respondent on the **30th of November, 2021** and **14th December, 2021** respectively. The Appellant submitted that the appeal principally challenge the decision of the lower court on both law and facts.

The Appellant gave a brief background and facts of the case. That the dispute originated from the District Land Disputes Tribunal LDT 4 of 2008 in which the Tribunal delivered its award sometime in 2008 in favour of the Respondent against the Appellant's father. That the decision of the Tribunal was appealed to the Eastern Provincial Appeals Tribunal vide Appeal Number 124 of 2009.

8. That being dissatisfied with the outcome of the Eastern Provincial Appeals Tribunal, the Appellant filed an appeal at Meru High Court being Meru High Court Appeal Number 1 of 2011, which was thereafter transferred to Chuka and assigned as CHUKA ELC Number 14 of 2017. That before CHUKA ELC Number 14 of 2017 was determined on merits, the Respondent herein proceeded to the magistrate's court and filed the application dated **5th October, 2020** which was determined on **8th April, 2021** and which is now the subject of this appeal.

9. The Appellant submitted that it is trite law that before a decision of a land tribunal is enforced, the same has to be adopted as an order of the court. The Appellant's counsel cited Section 7 and Rule 20 of the Land Disputes Tribunal Act (No. 18 of 1990), (now repealed). Section 7 provided as follows:

“The chairman of the tribunal shall cause the decision of the tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the tribunal.”

10. The Appellant submitted that the decision of the Land Disputes Tribunal was never filed by the Chairman or produced by him and verified as mandated under the law. That the law states in unequivocal terms that it is the chairman who has to appear as a material witness and produce the decision for it to be adopted as an order of the court. The Appellant submitted that in the impugned proceedings and the ruling granted by the lower court, the chairman never filed the District Land Disputes Tribunal's decision and consequently the same was not properly adopted as envisaged under Section 7 of the Land Disputes Tribunal Act (repealed). The Appellant submitted that the law demands that after the chairman of the District Land Disputes Tribunal's evidence/decision has been recorded to the satisfaction of the court, then the court thereafter ought to enter judgment by adopting the award, and the decree is enforced in the manner provided under the Civil Procedure Act. The Appellant's submission is that none of the steps laid in the law were followed by the lower court and/or the Respondent, and that the court simply proceeded to grant eviction orders without ensuring that the mandatory steps were followed, and further that the lower court erred by granting the eviction orders. The Appellant's counsel relied on the case of **Isaac Lisalitsa Alumasa v Paul Luteya Luvasia [2019] eKLR** and submitted that eviction notice ought to have been served before the lower court granted the eviction order. Counsel cited the provisions of Section 152E of the Land Act as introduced by section 98 of the Land Laws (Amendment) Act No. 28 of 2016. That absent the eviction notice, the learned magistrate was required to dismiss the Respondent's application. Counsel for the Appellant also relied on the case of **Atik Mohamed Omar Atik & 3 Others –v- Joseph Katana & another [2019] eKLR**, and further submitted that the trial court did not analyze the issues before it and failed to give reasons for its decision in complete disregard of the provisions of Order 21 Rule 4 of the Civil Procedure Rules.

11. The Appellant further submitted that there was no sufficient material placed before the learned trial magistrate that would warrant the issuance of the order of eviction of the Appellant. The Appellant submitted that the award from the Land Disputes Tribunal and the ruling in ELC 14 of 2017 were immaterial and not sufficient in allowing the eviction order. That the proper evidentiary material in support of the application for eviction ought to have been a decree evidencing the adopted award of the tribunal in accordance with section 7 (2) of the

Land Disputes Tribunal Act (repealed) and an eviction notice pursuant to section 152E of the Land Act. The Appellant therefore submitted that the learned trial magistrate erred in law and in fact and arrived at a decision against the weight of evidence before the court and further erred in finding that the Respondent herein had proved his case against the Appellant, hence the holding that the Appellant vacates the suit property. It is the Appellant's submissions that the manner the application for eviction was commenced and the resultant proceedings before the lower court were conducted contrary to the provisions of the law. The Appellant urged the court to intervene and set aside the impugned ruling and vacate the eviction orders and substitute the same with an order allowing the Appellant back to the suit land. It was submitted that the appeal has merit and the same should be allowed.

12. On his part, the respondent submitted that the issue of ownership of the suit land has been resolved in favor of the Respondent in the following court decisions; Igambang'ombe LDT No.4 of 2008; Principal Magistrate at Chuka LDT No.15 of 2009, Eastern Provincial Land Dispute Tribunal at Embu Appeal No.124 of 2009, Meru High Court Civil Appeal No.1 of 2011 and CHUKA HIGH COURT ELC NO.14 OF 2017. That it is apparent that the Respondent having won all court cases against the appellant is the owner of the suit land.

13. The respondent further submitted that it was on that back ground that he moved to court through Chief Magistrates Chuka LDT NO 15 OF 2009 seeking for an order of eviction against the Appellant under section 150, 152E, 152 F and 152 G of the Land Act. That the Appellant objected to his eviction in the trial court on the only ground that he applied for reinstatement of his Appeal in CHUKA HIGH COURT ELC No.14 of 2017 but the application for reinstatement was dismissed.

14. The respondent contends that before instituting the eviction suit in the trial court he had served the Appellant through the firm of Njeru Ithiga & Co Advocates with a 3-month Notice to vacate dated 26th September, 2017, but the Appellant refused to vacate. The respondent cited Section 152E of the Land Act, 2012 which provides as follows: -

“Eviction Notice to unlawful occupiers of private land

(1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve a notice, of not less than three months before the date of the intended eviction.

(2) The notice under subsection (1) shall-

a) be in writing and in a national and official language;

b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;

c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and

d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.”

15. The Respondent submitted that all the necessary procedures were followed by the trial court in ordering the eviction of the appellant from the suit property.

The Respondent cited the case of **James Mathuva Makewa v Nzavi Ngului (2012) eKLR** and the judgement of **Justice Munyao Sila in Margret Karwirwa Mwongera v Francis Kofi (2019) eKLR** where similar applications for evictions were allowed based on the aforementioned law.

16. The respondent further submitted that the matter has been in court for the last 12 years and that the Appellant had lost all cases concerning the ownership of the suit land and his only remedy is to vacate the suit land. The respondent reiterated the need for expeditious disposal of land matters in order to bring the disputes to an end and enable families/litigants move on.

17. The respondent submitted that the Appellant was evicted from the suit land by court bailiffs and the eviction was supervised by the Kenya police service and that the Appellant now lives on his own land with his family. He further submitted that the appeal lacks merit and is another attempt by the Appellant to procrastinate justice.

ANALYSIS & DETERMINATION

18. I have perused and considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the Law.

The issues for determination as I can deduce from the grounds of appeal is whether the Learned Magistrate misdirected herself on the Law in allowing the application dated 5th **October, 2020** and ordering the appellant's eviction from the suit property.

19. Section 152 E of the Land Act, 2012 provides for eviction in Kenya and it is as stated herein above.

20. In the instant case the respondent issued notice through the firm of Njeru Ithiga & Co Advocates with a 3-month Notice to vacate dated

26th September, 2017. The Appellant contends that there was no notice issued and therefore the eviction order was not proper. However, from the material on record, it is clear that there was notice given to the Appellant.

21. In the **case of Margret Karwirwa Mwongera versus Francis Kofi (supra)** a similar application was filed pursuant to section 152 E of the Land Act and Justice Sila Munyao held that an eviction notice had been served upon the appellant. It will also be seen from section 152 E (d) that the eviction notice is supposed to be served upon the Deputy County Commissioner in charge of the area where the land is situated and also upon the OCPD of the area.

22. In the instant case the learned trial magistrate was correct when she issued the eviction order. The respondent has clearly narrated in their submission on how he issued Notice through the firm of Njeru Ithiga & Co. Advocates. A 3- month notice was issued to vacate dated **26th September, 2017**. Moreover, the appeal at the High court had been dismissed and therefore nothing stopped the trial court from issuing the eviction notice as prayed. In my view, the proper procedure had been followed and therefore am inclined to uphold that the same was proper.

23. The Appellant has raised other grounds to the effect that the learned magistrate erred and failed to take into account the mandatory provisions of Section 152E of the Land Act and for failing to give the reasons for the said decision in contravention to the mandatory requirements of order 21 Rule 4 of the Civil Procedure Rules 2010. Order 21 rule 4 provides that judgements in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. I have perused the impugned ruling and I am satisfied that the learned magistrate addressed her mind to the issue of determination which was eviction and indeed pointed out that the Ruling of the High Court meant that the Appellant herein had no active pending appeal in court, Chuka ELC 14 of 2017 having been dismissed by Hon. P. M Njoroge, J.

24. The other issue for determination is whether the learned Magistrate erred in Law and fact in failing to take into consideration the Appellant's Submissions and whether she deliberately failed to render herself on the same. In the said Ruling dated **8th April 2021**, the learned magistrate has clearly stated that both sides opted to file submissions in support of or in opposition of the application. She clearly stated that she had gone through the submissions filed by both sides. This is in my view sufficient proof that the learned magistrate took into account the Appellant's submissions and any allegations to the contrary is unfounded.

25. The last issue I deemed fit to address is whether the learned magistrate erred in Law and in fact in arriving at a decision which was against the weight of evidence before her. In the ruling, the learned Magistrate has elaborately explained that the Respondent had relied on the ruling of LDT 4 of 2008 which decision was in his favour and gave orders that the appellant should give the Respondent vacant possession. From the evidence on record, the Appellant was aggrieved by the decision in LDT 4 of 2008 and appealed to the Provincial Appeals Committee vide Appeal No.124 of 2009. The Appellant also lost the appeal in the Provincial Appeals Committee and he was given a right to appeal within 60 days. He appealed to the High Court in Chuka ELC 14 of 2017. The appeal in the High Court was dismissed for want of prosecution, as the appellant in the High court did not attend court. Even after losing in all the cases mentioned above the Appellant still refused to vacate from the Respondent's land parcel thus the application that resulted in the impugned ruling. From the material on record, I am convinced that the learned Magistrate adequately arrived at a just decision based on the evidence that was presented before her.

26. The upshot of the Judgement is that I uphold the Ruling of the Honourable court dated **8th April 2021** and find that the Learned Magistrate correctly addressed the matter in her ruling. I find no basis to interfere with the said Ruling. Consequently, the Appeal is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 26TH DAY OF JANUARY, 2022 in the presence of:

C/A: Martha

Ms. Kijaru h/b for Muthomi Gitari for Respondent

N/A for Matunda for Appellant

C. K. YANO,

JUDGE.