



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 183 OF 2011

MONICA KAMUYA.....APPELLANT

VERSUS

MARGARET NDOTI MAUNDU.....RESPONDENT

(Being an appeal from the Judgment of the Senior Resident Magistrate's

Court at Kilungu by Hon. H. Nyakweba (SRM) in Civil Case No. 54 of 2010 dated 24th October, 2011)

JUDGMENT OF THE COURT

Introduction

1. The appeal before the court emanates from the judgment of Hon. H. Nyakweba, Senior Resident Magistrate delivered on **24th October, 2011**.
2. The genesis of this matter is a suit by the Plaintiff (*the respondent in this appeal*) claiming for the following orders:
 - i) Delivery order of the goods – documents
 - ii) Damages for trespass and conversion of the documents, and to the person of the plaintiff.
 - iii) Costs of the suit.
3. The trial court entered judgment against the 1st defendant as follows:
 - i) That the 1st defendant to deliver up the membership card, share certificate and allotment letters for plot nos. 1306-Agricultural and 312 Commercial Malili Ranch Ltd to the plaintiff.
 - ii) There was evidence that threats were used to acquire these documents and convert them. I award the plaintiff a nominal sum of Kshs. 10,000/= for trespass and unlawful conversion.
 - iii) I also award costs to the plaintiff.
4. The trial court dismissed the suit against the 2nd defendant.

5. The appellant then filed a Memorandum of Appeal against the trial court's judgment seeking the following remedies:-

i) The entire judgment of the court delivered on **24th October, 2011** be quashed and/or set aside.

ii) This court do make its independent conclusion and determination herein.

iii) Cost of this appeal and the lower court matter be borne by the respondent in any event.

6. The appellant raised five grounds of appeal, namely; that the learned magistrate erred in law and fact by finding that the membership card, share certificate and allotment letters for Plot Nos. 1306 Agricultural and No. 132 Commercial Malili Ranch are properly in the names of the respondent without the respondent proving the said ownership; that the learned trial magistrate erred in law and fact by finding that there was evidence of force used to obtain the said documents even in the face of controversial evidence in the respondent's case; that the learned trial magistrate erred in law and fact and caused a miscarriage of justice when he found in favour of the respondent and against the weight of evidence tendered; that the learned trial magistrate erred in law and fact when he disregarded the appellant's defence and as such occasioned a miscarriage of justice.

7. The Appellant submitted that the learned trial magistrate found that the plaintiff was the rightful owner of the documents in respect of plot Nos. 1306 and 312 Malili Ranch. This finding, according to the Appellant, was erroneous as during the plaintiff's testimony she testified that she could not remember how much she paid per share for her shares; could not remember what was her membership number in Malili Ranch; and could not remember when she was allocated the two plots in Malili Ranch.

8. Given that the plaintiff was not able to produce any receipts showing the monies that she had paid to Malili Ranch, and further given that the plaintiff was not able to call any of the officials of Malili Ranch to testify concerning her membership, the appellant submitted that the trial court grossly erred in law and fact by giving credence to the plaintiff's unsubstantiated claims of ownership of the two plots and the share in Malili Ranch. The appellant submitted that the failure to either call the ranch officials to testify or otherwise produce the receipts for the purpose was a material weakness in the plaintiff's case and the trial court severely erred in disregarding the same.

9. The appellant also submitted that if indeed the plaintiff had been the bona fide owner by purchase of the said shares, she would have been able to remember what dates she purchased the said shares and what was the price that she paid for them. This is especially so as no evidence was adduced to the effect that the plaintiff was suffering a memory ailment which rendered her unable to remember things. The plaintiff's failure to recall the said details casts doubt on her assertions of ownership.

10. Further, the appellant submits that the trial court ought to have warned itself of the dangers of relying on the sole testimony of the plaintiff and her daughter. This is especially so as one of the main planks of the suit, namely that the defendants had sold the plaintiff's land to an unknown person, was not proved at all, and that the trial court did not even refer to this issue in its judgment, merely saying that the suit against the 2nd defendant was dismissed as there was no evidence at all linking him to the acts complained of. The Appellant submitted that the failure of the plaintiff's claim against the 2nd defendant was ample proof that the plaintiff's suit was comprised of unsubstantiated claims.

11. The Appellant also referred to the plaintiff's plea that the defendant trespassed onto the person of the plaintiff by threatening and assaulting her and also trespassed onto the plaintiff's good namely her proprietorship documents namely membership card, share certificate and allotment letter to plot nos. 1306 and 312 and took them away. However, in her testimony, the plaintiff did not give any details of the alleged assault and trespass to her person by the defendant. She merely testified that one **Monica Stingo** and two girls and another person went for her at her home on one occasion and asked her to accompany them and threatened to beat her up if she declined. They then forced her to accompany them to the District Officer's office where she was ordered to transfer the land but she refused. It was never clarified whether the **Monica Stingo** mentioned was one and the same person as **Monica Kamuya**, the appellant

herein, and so it was an error on the part of the trial court to find for the plaintiff in that regard.

12. In light of the myriad and manifest contradictions in the plaintiff's evidence on the issue of how the documents came to be in the appellant's possession, the appellant submitted that the trial court erred in finding as it did that the plaintiff was entitled to compensation by way of damages for trespass and conversion.

13. The Appellant submitted that the plaintiff failed to establish her case against the defendants. The suit against the 2nd defendant was in fact dismissed as the plaintiff failed to adduce any evidence linking him to the acts complained of. The plaintiff also failed to adduce any evidence of any assault carried out absent her by the defendants or that she was coerced to hand over the documents to the appellant. The trial court therefore erred when it entered judgment against the appellant despite the lack of proof by the plaintiff.

14. In her defence, the appellant testified that she obtained the documents in question from the plaintiff who handed them over to her on various occasions. The appellant further testified that she was given the documents by the plaintiff who had informed her that the parcels were part of the estate of **John Maundu-deceased** - who was the plaintiff's late husband. The two were then to divide the said land. The Plaintiff however later on refused to carry out the sub-division and transfer. Given that the plaintiff did not adduce any convincing or cogent evidence as to how or when she acquired the plots or became a member of Malili Ranch, the appellant submitted that the trial court erred in disregarding the appellant's evidence which offered a reasonable explanation as to how she came to be in possession of the documents. In light of the above the appellant submitted that the appeal herein has merit and should be allowed with costs.

15. In reply the Respondent submitted that the Appellant's arguments on this ground are rendered invalid by the admission of the Appellant in her testimony in the trial court, where there is a clear and unequivocal admission that the Membership Card was in the name of the Respondent. The Appellant also admitted that the Respondent had the Share Certificate and Allotment Letter for the Plots 1306 and 312 Malili Ranch Ltd.

16. The Respondent submitted that force was used to cause her to surrender the said documents to the Appellant. The respondent produced Exhibit 1a-d being summons from the chief, which corroborates the respondent's testimony that she was forcibly picked up from her house, indeed with threats to be beaten up if she did not accompany the trespassers to the District Officer's office. The Appellant submitted that this testimony was not challenged during the cross-examination. The Respondent testified that the Appellant, one **Stingo** and 3 police officers came to their home and picked them to the District officer's office. The appellant states that the case has no merit and the same deserve to be struck out and urges the court, dismiss the Appeal and give costs to the respondent.

17. I have carefully considered the appeal. The issue for consideration on the grounds of the Appeal.

18. On ground number 1, that the plaintiff was the rightful owner of the said documents was not challenged. It did not matter that the plaintiff did not remember how much she paid per share for her share or that she could not remember her membership number in Malili Ranch or when she was allocated the two plots in Malili Ranch. It matters however, that the plaintiff/respondent was registered as the owner of these plots in shares. There was no attempt to challenge the allocation of those shares to the plaintiff. Further, even if the plaintiff held the said share on her own behalf and on the behalf of other family members, that is a different issue. The issue of land is that the respondent was registered as the owner of those shares. Any party who is not happy with that fact can only challenge how that registration took place, and can best do so in a Probate and Administration Cause. That was not the issue before the court.

19. On the issue of trespass, the record shows that the plaintiff /respondent was sent at least three notices to attend the chief or the District Officer's office but she did not. On the last occasion it was alleged that the police escorted her to the District Officer's office. In my view, the Respondent was given lawful

notices to attend to the District Officer's office. There is nothing wrong about that. Severally, she failed to comply. Being escorted to the District Officer's office by police is a lawful process. It is not indicated that she was beaten or in any way mishandled. The action of the police or any other administrative official cannot be outlawed and construed as trespass, when the person given the notice to attend has herself refused to honour the notice.

20. In the upshot, the appeal partially succeeds to the extent that the trial court's award of Kshs. 10,000 for trespass and unlawful conversion is dismissed. The rest of the lower court judgment stands.

21. The costs of this appeal shall be borne by each party.

That is the judgment of the court.

DATED AND DELIVERED AT MACHAKOS THIS 25TH DAY OF OCTOBER, 2016.

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E. OGOLA

JUDGE

In the presence of:

Mr. Muia holding brief for Mulei for Appellant

Court Assistant - Mr. Munyao