



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 82 OF 2009

SIMON MBOGO KABURA.....APPELLANT

VERSUS

CHARLES IRUNGU MUNIU.....RESPONDENT

(An appeal against the Judgment made on 18th June, 2009 by the Hon. Leonard M. W. Mutuku,

Senior Resident Magistrate, in Kigumo S.R.M.C.C.C No.71 of 2008)

JUDGMENT

This Judgment is the outcome of the appeal and cross appeal filed by the Appellant and the Respondent respectively against the decision of Hon. Mutuku Learned Senior Resident Magistrate delivered on 18th June 2009 vide Kigumo S.R.M.C.C.C no. 71 of 2008. The brief facts of the case are that **Charles Irungu Muniu**, hereinafter referred to as the Respondent, sued **Simon Mbogo Kambura**, hereinafter referred to as the Appellant, by way of a Plaint dated 11th April 2008 whereof the Respondent sought for judgment against the Appellant in the following terms:

- a. A declaration that the Plaintiff (appellant) is the legal owner as the registered owner of the parcel of land no. Loc.18/Githima/1178 and the defendant (Respondent) be ordered to move out of the suit premises and pay general damages for trespass and conversion.**
- b. Costs and interest of the suit.**
- c. Any other or better relief the honourable court may deem fit.**

The Appellant on his part filed a defence to oppose the Respondent's suit and claiming for inter-alia that the matter is *res-subjudice* and that the court lacked jurisdiction to entertain the case. When the case came up for hearing before the trial court the Appellant and the Respondent each testified without summoning any independent witnesses. The Learned Senior Resident Magistrate considered the evidence presented before her and in her judgment delivered on 18th June 2009, she dismissed the suit on the basis that the subordinate court lacked jurisdiction to hear an action based on the tort of trespass. She also ordered each party to bear his own costs. Both the Appellant and the Respondent were aggrieved by the decision, hence this appeal and the cross-appeal.

On appeal, the Appellant put forward the following grounds:

1. THAT the learned magistrate erred in the law and in fact in ordering that each party bears its cost in total contravention of laid down principles of awarding costs.

2. THAT the learned magistrate erred in law and in fact in failing to consider the principles applicable in awarding costs and thus exercised her discretion wrongly.

On his part, the Respondent put forward the following grounds in his cross-appeal:

1. The learned Magistrate erred in law and fact by her failure to appreciate and find that the main and/or fundamental issue before her both from the pleadings and from the evidence pertained to ownership of a registered parcel of land under the registered land act, cap 300 laws of kenya and thus not a matter falling under the land dispute tribunal's act.

2. The learned magistrate erred in law and fact by her failure to consider all issues in the suit and particularly issued touching and based on law of contract, the tort of conversion and declaration as a civil claim thus arrived at a wrong finding and judgment.

3. The learned magistrate erred in law and fact by her failure to consider the entire evidence before her and selectively picking and giving undue weight to only one issue while ignoring other evidence and pertinent issues in this suit.

4. The learned magistrate erred in law and fact in her interpretation and construction of the provisions of the land disputes tribunal vis-a-vis the provisions of the registered land act.

When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions. I have carefully considered the rival written submissions. In my view, I think it is convenient to first consider the cross-appeal before the appeal. In the first ground of appeal raised in the cross-appeal, the Respondent argued that the trial Magistrate erred when she failed to appreciate that the suit before her revolved around the question of ownership of the parcel known as **Loc.18/Githima/1178** registered under the **Registered Land Act** and not trespass as alluded under the **Land Dispute Tribunals Act**. It is argued that the Respondent tendered evidence proving ownership hence he should have been given judgment as prayed in the **Plaint**. The Appellant on his part urged this court to dismiss the cross-appeal on the basis that the Respondent's claim was actually based on trespass which the trial court had no jurisdiction to hear and determine. The first ground is interrelated to the second ground hence it is convenient to consider those grounds together. The Respondent accused the trial Magistrate of failing to consider the fact that the case was also based on contract also. I have already set out in brief the case that was before the trial court. In the **Plaint**, the Respondent averred inter-alia that he entered into a sale agreement with one Jane Muthoni Kimani to purchase **Loc.18/Githima/1178** at a consideration of Kshs.275,000. The Respondent testified before the trial court in which he stated that he together with the vendor attended the Land Control Board to obtain the relevant consent to have the suit land transferred to him. He tendered in evidence the agreement and the title deed. His complaint before the trial court is that despite taking the legal steps to lawfully acquire the land the defendant (appellant) has blatantly refused to give vacant possession. The appellant (defendant) on his part claimed he also bought the land from Jane Muthoni Kimani on 12th the month of March 2006. He did not produce as an exhibit in evidence the sale agreement. The appellant confirmed that he took occupation of the land in question in the month of July 2005. After considering the evidence from both sides the Learned Senior Resident Magistrate expressed herself at page 2 of her judgment as follows:

“From the evidence and pleadings of the plaintiff, paragraph 5 of the **plaint reads in part: “amounts to both criminal trespass and civil tort of trespass and the plaintiff claims damages for trespass.” Further prayer (a) of the **plaint** reads that “defendant be ordered to move out of the suit premises and pay general damages for trespass and**

conversion.

It is my humble finding that before the court orders for payment of any damages or gives a declaration that the defendant is the owner of the parcel of land Lo.18/Githima/1178, it ought to arrive at a finding as to the status of the defendant. I find that the main claim by the plaintiff against the defendant is that of trespass.

I find that the trial court has no jurisdiction over this matter.”

In ground 3 of the cross-appeal, the Respondent complained that the trial magistrate was selective in picking and giving undue weight to only one issue while ignoring other evidence and pertinent issues in this suit. At this stage, I think it is important to set out the prayers sought by the Respondent in the Plaint. As it can be gleaned from the Plaint, the Respondent sought for judgment in the following terms:

i. An order of declaration that Charles Irungu Muniu is the lawful registered owner of Loc.no.18/Githima/1178.

ii. An order of eviction against Simon Mbogo Kambura form Loc.18/Githuma/1178.

iii. General damages for trespass and conversion.

iv. Costs.

It is clear from the excerpt earlier set out herein-above that the Learned Senior Resident Magistrate dismissed the suit solely on the basis that the main basis of the Respondent's claim is trespass. With respect, that was an erroneous finding. A critical examination of the pleadings and proceedings will reveal that the tort of trespass was actually a peripheral issue. The trial court was actually called upon to make a declaration as to who between the parties is the lawfully registered owner of the land in question. The trial court had jurisdiction to make declaratory orders but unfortunately the Learned Senior Resident Magistrate failed to make a finding though she was asked to do so. This being the first appellate court, I am enjoined by law to re-evaluate the evidence and form an opinion. I have carefully considered the evidence and I have come to the conclusion that Charles Irungu Muniu had tendered credible evidence detailing the steps he took to acquire Loc.18/Githima/1178 from one Jane Muthoni Kimani. The Appellant has attempted to argue that the Respondent bought the land from someone who was registered to hold the land in trust of minor children. He further argued that the vendor did not obtain authority from court to sanction the transaction before the property can be conveyed to the purchaser. I think the Appellant's argument cannot be sustained for two reasons. **First**, when the Appellant was served with the Plaint and the summons to enter appearance, he filed appearance and a defence. He did not file a counter-claim to challenge the validity of the Respondent's title nor did he present evidence to show that he had filed a suit to challenge the Respondent's title. Even if he had purported to challenge the Respondent's title he would still have to surmount the question of his capacity to file an action without involving the vendor and the alleged trustees. **Secondly**, in his defence, the appellant claimed that he had purchased the land in question from Jane Muthoni Kimani. If it is true that he purchased the land from the same vendor who is alleged to have held the land in trust for minor children, then if his arguments are used, he will equally have no better title. In essence the Appellant was approbating and reprobating at the same time which conduct is not permitted in law. In the end, I find that the Respondent i.e **Charles Irungu Muniu** lawfully acquired the suit land. Consequently, he is declared as the legal registered owner of **Loc.18/Githima/1178.**

The second prayer which the Learned Senior Resident Magistrate should have determined is whether the Respondent was entitled to an order of eviction. The Respondent's rights as a registered proprietor are protected under **Sections 27 and 28 of the Registered Land Act.** His rights are superior than those of the appellant. In the circumstances, the Respondent was entitled to have vacant possession of the land hence he should have been given the order of eviction.

The third prayer is the one the learned trial Senior Resident Magistrate took time to determine. Basically,

the Respondent had sought for damages for trespass and conversion. With respect, I agree with the views of the learned Senior Resident Magistrate that in this prayer, the Respondent beseeched the court to make a finding on a claim based on the tort of trespass. In other words, before granting the order for damages for trespass one must first determine whether or not the act of trespass was committed. Let me at this juncture state, that this was one of the prayers in the suit which in my view was peripheral. The jurisdiction to entertain any action based on the tort of trespass was taken away from the Magistrates Courts and given to the **Land Disputes Tribunals Act** under **Section 3(1)** of the **Land Disputes Tribunals Act no.18 of 1990** (*now repealed*) and under **Section 159** of the Registered Land Act. In the circumstances, the trial magistrate should have only struck out that prayer alone and not to dismiss the entire suit. In the final analysis, I think the cross-appeal will succeed to the extent proposed herein-above.

It is now convenient to turn my attention to the appeal of Simon Mbogo Kabura (appellant). Earlier in this judgment, I reproduced the two grounds enumerated in the Memorandum of Appeal. The appellant accused the trial Magistrate of denying him costs of the case whereas he was entitled to costs under **Section 27** of the **Civil Procedure Act**. The Respondent was of the view that the trial magistrate cannot be faulted in the manner she exercised her discretion in awarding costs. I have looked at the proceedings and considered the rival submissions. It is not in dispute that the Learned Senior Resident Magistrate made an order directing each party to bear their own costs. The *Priviso* to **Section 27** of the **Civil Procedure Act** expressly states that costs shall follow the event unless the court for good reason otherwise provide. There is no doubt that when the trial Magistrate made the order on costs, she did not attach any reasons to her decision. With respect, I agree with the appellant that the Learned Senior Resident Magistrate fell into error. The law required her to attach reasons for her decision. In the circumstances of this case she should have awarded the succeeding party costs.

In the end, the appeal by **Simon Mbogo Kabura** (appellant) is allowed save that it will render superfluous in that it will be superceded by this court's decision on the cross-appeal by Charles Irungu Muniu (Respondent).

The cross-appeal by Charles Irungu Muniu (Respondent) is allowed. The judgment and or decree dismissing the Plaintiff's case vide Kigumo S.R.M.C.C.C no. 71 of 2008 is set aside and is substituted with the following orders:

- 1. A declaration that Charles Irungu Muniu is the lawfully registered owner of Loc.18/Githima/1178.**
- 2. An order directing Simon Mbogo Kambura to vacate Loc.18/Githima/1178 within 30 days from the date hereof and in default he be forcefully evicted.**
- 3. The claim for damages for trespass and conversion is ordered struck out for want of jurisdiction.**
- 4. Costs of the suit is given to the Plaintiff (Respondent herein).**
- 5. Costs of the appeal is given to the Respondent.**

Dated, Signed and delivered in open court this 21st day of February, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Mr. Kiboi holding brief for Kirubi for the Respondent

N/A for K.Macharia for Appellant