



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.54 OF 2011

EUNICE WANJIRU KAMAU.....1ST APPELLANT

AGNES WAITHERA KIIRU.....2ND APPELLANT

VERSUS

NANDUTARI LARRABI.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. B. Atiang', R. M. delivered on 30th March, 2011 in CMCC No. 447 of 2008)

JUDGMENT

FACTS

1. The Appellants, **Eunice Wanjiru Kamau** and **Agnes Waithera Kiiru** preferred this appeal following their dissatisfaction with the decision and judgment of the Resident Magistrate at Nakuru in CMCC 447 of 2008 in which the Respondent, Nandutari Larrabi obtained orders for vacant possession of House No.3 in Rongai Township and a declaration that the Respondent was the owner the aforementioned house.
2. The Appellants being aggrieved with the decision preferred this appeal and in their Memorandum of Appeal listed five grounds of appeal *inter alia*;

i) That the learned trial magistrate erred in law and in fact by directing vacant possession of House No.3, Rongai Township without considering the present occupation since 1987 and the irregularities the respondent used to obtain the said (sic).

ii) That the learned trial magistrate erred in law and in fact filing to give reasons justifying the conclusion that he arrived at.

iii) The learned trial magistrate misappreciated the applicable law and as consequences he misdirected himself on the applicable standard of proof in civil cases.

iv) That the learned trial magistrate distorted the evidence they adduced and their witnesses as a result allowed the respondent's case on his own set of facts which contradicted the evidence.

v) That the learned trial magistrate erred in law and in fact as he mostly relied on administrative office with County Council of Nakuru without having regard to the irregularities for purchasing House No.3, Rongai Township.

3. At the hearing of the appeal, Mrs. Ndeda Learned Counsel appeared for the 1st Appellant whereas Ms Njoroge appeared for the Respondent. The 2nd Appellant was also in attendance and informed the court that she did not prefer any appeal and that she was wrongfully enjoined as she had already vacated the premises and was not desirous of pursuing the appeal.
4. This court considered the 2nd Appellant's prayer to abandon the appeal and granted her prayer and her appeal was marked as withdrawn.

1st APPELLANT'S SUBMISSIONS

5. Mrs. Ndeda, Learned Counsel submitted that the 1st appellant was and still is an employee of the County Council and having been allocated the said house as an employee, she should have been considered first when the County Council decided to sell the house. She prayed that the court re-evaluate the evidence and arrive at a different decision and allow the appeal and set aside the judgment and also award the costs of the appeal be awarded to the 1st appellant.

RESPONDENT'S SUBMISSION

6. Ms. Nancy Njoroge, Learned Counsel for the Respondent opposed the appeal stating that the findings of the trial magistrate were based on the evidence on record. She referred to documents that allowed the sale of the house. She informed the court that the Respondent followed the procedures laid down to purchase the house. Upon being allocated the houses she gave notices to the 1st Appellant and the other tenants and thereafter filed the suit in the lower court.
7. Counsel further submitted the court that the 1st Appellant never testified in the lower court. No evidence was tendered by 1st Appellant for trial court to distort as set out in the grounds of appeal. Nor was any evidence tendered for the trial court to consider as irregularities and therefore prayed for the dismissal of the Appellant's appeal with costs as it had no merit.

ANALYSIS

8. This is a first appeal and in that regard, the duty of this court is to re-consider and re-evaluate the evidence and draw its own independent conclusion. Refer to the case of **Selle and Anor. V. Associated Motor Boat Co. Ltd and Others**, [1968] EA 123.
9. First appeals can be made based on fact and law.
10. Despite having been served the 1st Appellant did not attend the trial in the lower court and did not adduce any evidence. Counsel for the 1st Appellant attempted to place reliance on the evidence of the 2nd Appellant. But this court opines that the 2nd Appellant occupied her house seriatim not jointly. Any evidence adduced was with reference to her unit. As she had chosen to withdraw her appeal the 1st Appellant cannot rely on her evidence.
11. From the Memorandum of Appeal and the submissions made there is no new additional evidence that has been produced to counter the evidence of the Respondent on ownership. The Respondent at trial produced evidence to demonstrate that she was the owner of the subject property having purchased it from the County Council of Nakuru. The Respondent's evidence remains uncontested as it is not controverted.
12. There is therefore no evidence for this appellate court to re-evaluate and to re-assess so as to arrive at an independent conclusion.

DETERMINATION

13. For the reasons stated above this court finds that the appeal is lacking in merit in its entirety.
14. It is hereby dismissed with costs to the Respondent payable by the 1st Appellant.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 31st day of July, 2014.

A. MSHILA

JUDGE