



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 40 OF 2011

JOYCE THAARA MACAKI.APPELLANT

VERSUS

ISACK MUCIRA1ST RESPONDENT

DERICK MWANIKI NDWIGA2ND RESPONDENT

(An Appeal from the Judgment/Decree of Mr. S.M. Mokuia – PM sitting at Siakago in Civil Case No. 49 of 2008 delivered on 24/2/2011).

J U D G M E N T

Joyce Thaara Macaki the Appellant herein was the Defendant while **Isaack Mucira** and **Derrick Mwaniki Ndwiga** the Respondents were the Plaintiffs in the lower Court.

The Respondents had claimed ownership of land parcel number NTHAWA/GITIBURI/1520 and sought an order of Permanent injunction against the Appellant. The matter proceeded to full hearing and the Court found for the Respondents and issued a permanent injunction restraining the Appellant from interfering or entering into the Plaintiffs land parcel number NTHAWA/GITIBURI/1520. The Appellant was aggrieved and filed appeal citing the following grounds;

1. *The learned Magistrate erred in law and facts in arriving at a finding that was against the law.*
2. *The learned Magistrate erred in law and facts in ordering for the eviction of the Appellant from land parcel number Nthawa/Gitiburi/1520 when the Court clearly did not have jurisdiction to hear and determine matters of eviction from land registered under the Registered Land Act.*
3. *The learned Magistrate erred in law and facts in not setting out the statement of the case, the concise points for determination, the decisions thereon and the reasons for the decisions as by law required.*
4. *The learned Magistrate erred in law and facts in finding that the ownership of land pa*
5. *rcel number NTHAWA/GITIBURI/ 1520 was a matter in issue in Civil Case number 49 of 2008 when the same was clearly not an issue.*
6. *The learned Magistrate erred in law and facts in making a determination and/or finding on a matter that was not in issue in Civil Case number 49 of 2008.*

7. *The learned Magistrate erred in law and facts in entering Judgment on a prayer for eviction which had specifically been dropped and/or abandoned by the Respondent and which was therefore not an issue on Civil Case number 49 of 2008 and on which Court ought not to have made any finding.*
8. *The learned trial Magistrate erred in law and facts in not finding that prayer (a) in the plaint was incapable of being granted as the Appellant was prior to the filing of Civil Case number 49 of 2008, during the pendency of the said case and even at the time of entering Judgment, in occupation of land parcel number NTHAWA/*

GITIBURI/1520 ad therefore the Appellant could not have been restrained from entering upon the said land as she was already in occupation.

9. *The learned Magistrate erred in law and facts in not finding that the Respondents failed to prove their case on a balance of probabilities as by law required to warrant judgment being entered in the Respondents favour.*
10. *The Judgment was against the weight of evidence.*

The case that was presented to the Court was that the original registered owner of this land was one NJIRU KANGANGI who was the Appellant's husband. He died in 1994 but did not give any documents in relation to this land to the Appellant. The certified copy of the register (DEXB1) shows that in 1985 Stephen Muruu Meria bought the land and was registered as the owner. Apparently he never took possession of the land. And in 2008 the said Stephen sold the land to the Respondents who were registered as proprietors. When all this was happening the Appellant was living on the land. The Respondents wanted to utilize the land and so came to Court seeking two orders;

1. *Eviction*
2. *Permanent injunction*

In the course of the proceedings they withdrew the prayer for eviction. In her evidence the Appellant maintained that she had always known the land to belong to her deceased husband who was the 1st registered owner. A look at the defence by the Appellant shows a general denial of the claim by the Appellant. She only challenged the Court's jurisdiction on the prayer of "EVICTION" which was later withdrawn. She filed no counterclaim.

This is a 1st appeal and this Court is enjoined to reconsider and reevaluate the evidence and arrive at its own conclusion. This was the holding in the cases of;

1. *SELLE & ANOTHER –VS- ASSOCIATED MOTOR BOAT CO. LTD & OTHERS [1968] E.A. 123*
2. *WILLAMSON DIAMONDS LTD & ANOTHER –VS- BROWN 1970 E.A. 1.*

Later in the case of *KAMAU –VS- MUNGAI & ANOTHER [2006] 1 KLR 150* the Court of Appeal held thus;

“This being a first appeal, it was the duty of the Court of Appeal to reevaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making the allowance for that”.

When this appeal came for hearing both Counsels agreed to dispose of it by written submissions which they both filed. I have keenly read through them. I have also considered them alongside the evidence which I have re-evaluated. Both parties are in agreement that the Respondents are the registered proprietors of the suit property having bought it in 2008. (DEXB1). The Respondents also agreed that though Stephen Murimi allegedly bought the land in 1985 he never set foot on it and eventually sold it in 2008. There is no dispute that the Appellant was living on the land prior to 2008 when the Respondents bought the land.

The Appellant's grounds number 2, 4, 5 and 6 are not the true position in the Judgment. The prayer for eviction was withdrawn and the learned trial Magistrate never dealt with it. Infact on Ground 4 the position is clearly stated at page 25, line 6 by the learned trial Magistrate who stated;

“It is clear herein that ownership is not in issue”.

He never therefore dealt with it. The said grounds 2, 4, 5 and 6 must fail. In Ground 3 I do find that the learned trial Magistrate indicated at page 25 line 18-19;

“Bearing in mind that ownership as per records kept at land's office is not being challenged, it appears to this Court what is in issue is utilization of the suit land”.

He therefore identified the issue for determination and in lines 20-30 same page where he explained how he arrived at his decision. I now wish to deal with ground 1, 7 and 8.

The evidence shows that the Appellant had been and is in occupation even as at the time of purchase by Respondents. In her pleadings she did not indicate how she came into possession and why she should remain in possession. She did not raise any counterclaim. The very good submissions by Mr. Okwaro in the Court below and on appeal could not and can't be acted on because the issues were not pleaded. And Counsel can't be seen to be giving evidence. This is what the learned trial Magistrate stated in his Judgment at page 25 line 7-14.

“The defence attempted to introduce several issues at submissions stage such as limitation of actions, overriding interest as provided for in section 30 of the Registered Land Act (now repealed). The aforesaid issues were not pleaded in the defence. The law is quite clear that a party has to confine itself to all pleadings, not even the line of evidence should be outside pleading. It was therefore necessary for the defence to plead all issues which they wished to advance evidence on”.

I therefore find that the Appellant failed to plead important issues which would have assisted her in her case in the Court below. The Respondents had initially asked for 2 prayers i.e.

- i. ***Eviction***
- ii. ***Permanent injunction***

When the defence raised the issue of jurisdiction the Respondents were quick to withdraw the prayer of eviction. This was the greatest mistake they made. They ought to have withdrawn the entire suit and filed it in a Court with competent jurisdiction. The evidence is clear that the Appellant has been in occupation for quite a long time. A Court hearing such a case would first of all have to establish ownership then order for eviction and issue a permanent injunction to barr the person from entering and/or interfering with the land. The Appellant already being on the land cannot be barred from entering before being evicted. That is exactly what the learned trial Magistrate did. And on these 3 grounds I do find the appeal to have merit. Since the SPM's Civil case No.49/08 did not address the issues of;

- i. ***Occupation***
- ii. ***Eviction***

as they were not claims before the Court, I do find that the parties herein can still file a proper suit before the Environment and Land Court for all these issues to be addressed.

The result is that the appeal is allowed. The Judgment of the lower Court is set aside. It shall be substituted with an order dismissing the Plaintiff's suit with costs. Each party to bear his/her own costs of the appeal.

DATED, SIGNED AND DELIVERED AT EMBU IN OPEN COURT THIS 30TH DAY OF JULY 2013.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Okwaro for Appellat

Njue – C/c