



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
LAND & ENVIRONMENT COURT
CIVIL APPEAL NO.75 OF 2010

FREDRICK MUTONYI GITONGA.....APPELLANT

VERSUS

ISAIAH MUTONYI WAMBUGU)

LUCY WANGUI MUTONYI).....RESPONDENTS

J U D G M E N T

In this appeal the Fredrick Mutonyi Gitonga the Defendant in the lower court is referred to as the **appellant** whereas Isaiah Mutonyi Wambugu and Lucy Wangui Mutonyi, the plaintiffs in the lower court are referred to as the **Respondents**.

The appellant was sued by the respondents in the Chief Magistrate's Court in Nyeri in Civil Cause No.804 of 2005. The respondent's case in the lower court can be discerned from the plaint dated 25th October 2005 in which they asserted that they were the registered owners of parcel of land **No.Othaya/Kiahagu/755** measuring 1.42 ha or thereabout having bought the same from one Rose Gathoni Wahome. They took occupation and used the land to the exclusion of everyone and had constructed a timber house for their use and that of their farmhands.

Without any colour of right, the appellant entered the land and destroyed the farmhouse valued at Kshs.15,000/-. The respondents reported to the police however the appellant went into hiding to evade arrest. In the meantime, he was using a lot of violence to stop the respondents from utilizing their parcel of land. The respondent's claim in the lower court was the value of the destroyed building and for a permanent injunction against the appellant, his agents, servants and or anybody else claiming to act under him from in anyway interfering with the respondents quiet and peaceable enjoyment of the suit land. Despite Notice of intention to sue, verbal warnings and entreaty, the defendant did not heed and therefore the claim.

The Respondents therefore prayed for;

- a. **A permanent injunction directed against the defendant his agent, servant or anybody else claiming or acting under him from interfering with the plaintiff's and or his lawful agent's peaceable and quiet utility of Othaya/Kiahagu/755.**
- b. **Kshs.15,000/- being the value of the destroyed property.**
- c. **Costs plus interest at court rate.**

The appellant responded to the respondents claim in the lower court by a defence dated and filed on 14/9/2005 stating that when the respondents bought the suit land they were aware of the case pending over the same property between the defendant and one Rose Gathoni Wahome, from whom they bought the land and therefore were not innocent purchaser without Notice. The appellant's case in the lower court was that the respondents could not take exclusive occupation of the suit premises since they were aware of the appellants use and occupation of the same and had in fact sought the assistance of the local District Officer to have the respondents removed. In a nutshell, the appellant demanded strict proof of the allegations in the plaint and put the respondents to strict proof thereof and prayed for dismissal of the suit.

The defence was followed by a counter claim filed and dated on 29th June 2009. The gist of the counter claim was that there was an order by Justice Makhandia made on 12/11/2008 staying Nyeri High Court Civil Case No.96 of 2007 pending the outcome of Nyeri Chief Magistrate Court Civil case No.804 of 2005. The appellant stated in the counter claim that there was High Court Civil No.45 of 2002 at Nyeri pending between the appellant and one Rose Gathoni Wahome from whom the plaintiff bought the disputed land parcel No.Othaya/Kiahagu/755. Moreover that the appellant had been in a continuous and uninterrupted occupation of the land for more than twenty years since 1989 and had cultivated horticultural crops such as bananas, napier grass, maize, beans, sweet potatoes, English potatoes and cash crops such as tea bushes, coffee trees, tea seedlings and trees. The appellant further claimed in the counter claim that the respondents took occupation and use of the disputed land before they were registered as proprietors and destroyed three thousand tea seedlings, tea leaves, coffee trees, coffee cherries, trees and horticultural crops interalia.

According to the appellant he was entitled to adverse possession by section 38 of Limitation of Actions Act Cap 22, Laws of Kenya to the disputed land parcel No.Othaya/Kiahagu/755. He prayed for judgment and dismissal of the respondents suit in the lower court and malicious damages, special and general damages.

There was no reply to the counter claim whereupon the appellant applied for judgment on the counter claim. On the 29/10/2009, interlocutory judgment was entered against the appellant for failure to file defence to counter claim and the matter was fixed for formal proof on the 17th of December 2009. On the scheduled date parties were absent and therefore the counter claim was dismissed for want of prosecution.

Through the application dated 13th of January 2010, the appellant prayed for the reinstatement of the counter claim for the formal proof to proceed. The application was allowed and the appellant ordered to proceed. The matter was then scheduled for hearing on the 29th March 2010.

On the scheduled date the appellant proceeded with his defence as opposed to formal proof. There appear to be an error apparent on the face of the record as the appellant was to proceed with formal proof as judgment had been entered against the respondents on the counter claim and that the counter claim had been reinstated by allowing the application dated 3/1/2010.

In his testimony in the lower court, the 1st Respondent stated that he was a Consultant Engineer at Nairobi and Lucy Wangui Mutonyi was his wife. He had a title issued to him in respect of the land in issue on 20/9/2005. He was in the process of constructing a stone building on the land. However, he had put up a temporary structure for his workers which was later pulled down and the iron sheets stolen by the appellant. The respondents produced proceedings to prove that the appellant was charged, convicted and sentenced. However he appealed but there is no document to show the position of the appeal.

The appellant on the other hand testified and stated that he filed a defence but there was no reply to defence. He stated on oath that when the respondents went to buy the land, he was already cultivating the same. He had a dispute with the person who sold the land to the respondents. He further stated that he had stayed on the land for more than 12 years. He filed a counterclaim but there was no reply to the counter claim and therefore he asked for judgment on the counter claim.

The respondents filed their submissions on the 23/4/2010 in compliance with the court order made on the 29/3/2010. The appellant did not.

In her considered judgment the learned magistrate S.M. Muketi as she then was observed, and correctly so, that the issue, that had to be determined was whether the respondents were entitled to the orders sought as the defendant? was not claiming ownership of the land sold but was claiming that he had not been paid the full amount by Rose Gathoni Wahome who had sold the land to the respondents and title issued. The learned magistrate further correctly observed that the suit between the appellant and Rose Gathoni Wahome did not have direct relation with the case before court as he had sued Rose Gathoni Wahome for

- a. **Breach of agreement**
- b. **Development compensation**
- c. **Interest**
- d. **costs.**

The appellant has appealed to this court to reverse the decision of the learned magistrate relying on memorandum of appeal dated and filed on the 7th of May 2010. The same was amended and the amended memorandum of appeal dated and filed on the 5/10/2011, a further amendment was dated 3rd January 2012 but appears not to have been filed.

The 1st issue this court should consider is whether the amended memorandum of appeal is properly on record. It is my considered view that the memorandum of appeal dated 5th of October 2011 raises new issues from the one dated and filed on the 7th of May 2010. Moreover, the same having been filed after the expiry of 28 days from the date of the judgment, leave of the court ought to have been obtained. There is no evidence that the same was obtained and therefore the same is a nullity. The same principle applies to the Memorandum of Appeal dated 3rd January 2012 which appears not to have been filed as it neither bears the stamp nor the seal of the court.

The upshot of the above is that the court is obliged to consider the Memorandum of Appeal dated and filed on 7th day of May 2010 whose grounds of appeal are as follows:-

1. **The trial Magistrate erred in law and facts by delivering the said judgment against the appellant.**
2. **The trial Magistrate erred in law and facts by adjudicating respondents claim based on trespass as the same is not within the jurisdiction of the subordinate court.**
3. **The trial Magistrate erred in law and facts by re-hearing matter which had been decided in his favour.**
4. **The learned trial Magistrate erred in law and facts in failing to consider his defence that was not replied to, and his counterclaim which not challenged by the respondent.**
5. **The trial Magistrate erred in law and facts by relying on respondent's false allegation.**

This court finds that the *first ground* is ambiguous and general in its framing and makes no further finding on the same. *The second ground* is on jurisdiction of the court and the appellants argument is that the claim was based on trespass and therefore the court lacked jurisdiction as the same could only be entertained by the Land Disputes Tribunal. Prayer 1 of the plaint is very clear as the injunction issued against the appellant from interfering with the respondents quiet enjoyment of the suit premises was not in respect of boundary dispute but a dispute on ownership. The trespass envisaged in Section 3 of the Land Dispute Tribunal Act in one that relates to boundary dispute. There was no boundary dispute between the appellant and respondents.

The upshot of the above is that I do find that the learned Magistrate had jurisdiction to hear and determine

the suit as she did.

The **3rd ground** of Appeal was not canvassed by the appellant during the hearing, however I understand him to imply that after interlocutory judgment the matter should have proceeded to formal proof.

I do find an error apparent on the face of record in the proceedings due to the fact that after entry of interlocutory judgment in favour of the appellant the matter proceeded as if it was defence hearing and formal proof at the same time. However, this error does not prejudice to appellant as his testimony was considered by the Magistrate in reaching the final decision. Moreover, the counterclaim was based on adverse possession whereas a claim based on adverse possession cannot be commenced as a counter claim in the magistrates court that lack jurisdiction to entertain claims based on adverse possession.

The **4th ground** is based on the fact that there was no response to the defence and counter claim. Failure to respond to the defence was not fatal as the defence was a general denial of the allegation in the plaint. On the counter claim I reiterate my findings that the same does not hold water as a claim on adverse possession cannot be commenced by counter claim.

This court finds that ground 5 is ambiguous and therefore the same is not considered and therefor the appeal herein is dismissed with no orders as to costs, orders accordingly.

Dated, signed and delivered at Nyeri this 11th day of October 2013.

A. OMBWAYO

JUDGE