



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 45 of 2009

KRISBIANUS MOGOIGA MUCHUNI.....APPELLANT

-VERSUS-

THOMAS CHACHA MATIKO.....RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of the Resident Magistrate's Court at Kehancha, Hon. J. R. Ndururi in RMCC No. 15 of 2007 dated 12th February, 2008)

The appellant, **Krisbianus Mogoiga Muchuni**, the Plaintiff in the original action, has appealed against the judgment and decree of the Resident Magistrate (Hon. **J. R. Ndururi**) in Kehancha RMCC No. 15 of 2007 (**Krisbianus Mogoiga Muchuni –vs- Thomas Chacha Matiko**). In that action, the learned trial magistrate dismissed the appellant's suit on the basis that the appellant had not proved ownership of plot no. 2 in Kugitimo market (herein after referred to as the plot).

The appellant brought his action in the lower court by way of a plaint dated 18th April, 2007, in which he pleaded, inter alia, that he was the owner of the plot having been allocated by the Municipal Council of Kehancha in the year 1972. That on or about the month of September 2005, the defendant unlawfully and with no justifiable reason entered into the plot and started constructing a building.

In his defence dated 30th April 2007, the respondent denied the appellant's claim and pleaded that he was the allottee of the plot since 1985. He further pleaded that being the owner of the plot, he never encroached or unlawfully developed the plot.

At the trial, the appellant gave evidence and stated that he was the owner of the plot and produced as PEXH 1 a plot card No. 002 and a letter dated 19.05.06 from Kehancha Municipal Council as PEXH 2 showing that he was the allottee of the plot. The appellant testified that he started developing the plot in 1997 and alleged that the respondent removed and destroyed his foundation. Further, the appellant testified that he complained to Kehancha Municipal Council who directed that no developments should be carried out on the plot until the dispute was resolved. That the Municipal Council decided that the plot was his and gave him the letter produced as PEX 2. The appellant further testified that the respondent had started developing the plot by putting up a structure and that the respondent had refused to vacate the plot despite many warnings prompting the appellant to file the suit.

In cross examination, the appellant maintained that he was allocated the plot in 1972 and that he started paying plot rent in 1993. Further, the appellant stated that he did not know whether there existed any

conditions when he was allocated the plot. The appellant admitted to not developing the plot within one year and six months but denied that the Municipal Council had repossessed the plot. The appellant closed his case without calling any other witness.

The respondent testified that he did not grab the plot. He admitted that the appellant was allocated the plot in 1972 and stated that the plot remained undeveloped until 1985. That Homa Bay County Council advertised the plot and he applied to be allocated and that upon allocation of the plot to him, he started developing it. That the appellant stayed in the plot up to 11th May 2001 when the Clerk, Kehancha Municipal Council requested the respondent to provide rate receipts which he provided. The respondent produced as DEXH 1 minute no. 29 of 2005 in which, he testified, that South Nyanza County Council had allocated the plot to him. The respondent further testified that he was issued with a plot card which however he had returned to the Kehancha Municipal Council during the ownership dispute. The respondent maintained that he was the owner of the plot in which he had built a house and that he had been in possession since 1986.

The respondent called one witness. **RAWE PETER MARWA** (D.W.2) He testified that he was working with Kehancha Municipal Council as a land surveyor and was conversant with the plot which fell under the jurisdiction of the said local authority. That in the minutes of Town Planning Markets and Housing Committee of South Nyanza Council held on 4th September, 1985 (DEXH 1), plots numbers 2, 4, 5, 6 and 7 were all forfeited to the Council but that the Minutes did not show the person to whom plot no. 2 was re-allocated. DW2 further testified that according to Municipal Council of Kehancha, the plot is now owned by **Krisbianus Magoiga Muchuni** (the appellant) and that in the minutes of a Committee meeting held on 10th August, 2005, under minute no. 2, Plot No. 2 Kugitimu Market “**Muchuni –vs- Chacha Matiko**” the Committee resolved that **Muchuni** was the rightful owner of the plot and **Chacha Matiko** advised to obtain correct minutes from South Nyanza County Council. The minutes of 10th August, 2005 were produced as PEXH 4. The respondent closed his case at this juncture and parties filed their respective submissions.

On the conclusion of the evidence, the learned trial magistrate found that the appellant did not prove on a balance of probability that he was the owner of the plot. That decision provoked this appeal. The appellant has listed seven (7) grounds of appeal namely:

- 1. The learned trial magistrate erred both in law and fact when he failed to appreciate that the appellant was the legally registered owner of plot no. 2 Kugitimo Market.*
- 2. The learned trial magistrate erred both in law and fact when he failed to appreciate that the appellant held a valid plot card in respect to plot no. 2 Kugitimo market and hence his rights over the suit land superceded that of the respondent.*
- 3. The learned trial magistrate erred both in law and fact when he found that the suit plot no. 2 Kugitimo Market was re-allocated to the respondent without any proof.*
- 4. The learned trial magistrate erred both in law and fact when he purported to determine the issue of right of ownership of plot no. 2 Kugitimo market when there was still a dispute over the same before Kehancha Municipal Council.*
- 5. The learned trial magistrate erred in law and fact in ignoring the appellant’s pleadings evidence and submissions.*
- 6. The learned trial magistrate gravely erred in law in entering judgment in favour of the respondent who had not proved his case.*
- 7. The learned magistrate went on a frolic of his own disregarding the evidence on record and arrived at an erroneous conclusion.*

This is a first appeal. The court is therefore duty bound to reconsider the evidence adduced before the lower court and make its own evaluation and draw its own conclusions. In doing so, the court should bear in mind that it has not had the advantage of seeing and hearing the witnesses testify and should give allowance for that. This principle was espoused by the Court of Appeal in **Peters –vrs- Sunday Post Limited [1958] E.A. 424**, which was expressed as follows at page 1429:-

“It is a strong thing for an appellate court to differ from the finding on fact of a judge who tried the case and who has had the advantage of seeing and hearing the witnesses. But the jurisdiction (to review the evidence) should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

On the above principles, this court can only interfere with the trial court’s findings of fact if the findings were based on no evidence or on a misapprehension of the evidence or if it is shown clearly that the trial court acted on wrong principles in reaching its findings.

Applying the above principles, I ask myself whether there is basis for interfering with the findings of the learned Resident Magistrate. Did the appellant prove the ownership of plot number 2 Kugitimo Market against the respondent on a balance of probability?

In finding that the Plaintiff had not proved the ownership of the plot on a balance of probabilities the learned magistrate stated thus:-

“Both the plaintiff and the defendant have produced documents to support their claim. More importantly, the Plaintiff produced an extract of the minutes of Works, Town Planning and Markets Committee of the Municipal Council of Kehancha (which succeeded the earlier mentioned local authority) which shows that the issue of ownership is still in dispute. It is therefore obvious that even the concerned local authority is not sure who between the plaintiff and the defendant is the owner of the suit plot”

The minutes of Works, Town Planning and Markets Committee of the Municipal Council of Kehancha referred to by the learned magistrate were produced as PEXH no. 4. For the avoidance of doubt, I will quote the relevant paragraph in reference to plot number 2 Kugitimo, **Machuni –vs- Chacha Matiko:-**

“Resolved that Mr. Machuni is the rightful owner of the land while Mr. Chacha was told to go and obtain clear minutes from Homabay (former South Nyanza County Council) to prove ownership. Mr. Machuni should not make any developments on the plot until when the office will have communicated to him.”

Through a letter dated 19th May, 2006 produced during trial in the subordinate court as PEXH 2, the appellant was informed by the Municipal Council of Kehancha that he was the legal allottee of the suit plot. I quote paragraph 2 of the said letter below:-

“You are hereby informed that following the long deliberations in several Town planning, Markets and Works Committee, it has been resolved vide KMC/WTP&M/MIN/19/ 2005 of 10.08.05, further adopted vide KMC/FC/MIN /5/2006 of 01.03.06 that you are the legal allottee of the above said plot” (Plot no. 2 Kugitimo Market)

In my view, PEXH 2 settled the dispute on ownership. This was corroborated by the evidence of DW2 who testified that according to Municipal Council of Kehancha, the plot is now owned by the appellant. The respondent testified that he was allocated the plot by South Nyanza County Council and produced as DEXH 1 minute no. 29 of 2005. I have perused DEXH 1 and Minute no. 29 of 2005 does not indicate that the plot was allocated to the respondent.

Considering the evidence on record, I find that the learned magistrate misapprehended the evidence when he arrived at a finding that ownership of the plot is still in dispute between the parties when the Municipal Council of Kehancha resolved that the appellant was the legal allottee of the plot. In the result, I allow the appeal, set aside the judgement dated 12th February 2008 and substitute therefore an order declaring that the appellant is the owner of plot number 2 Kugitimo Market. I also issue a permanent injunction

restraining the respondent or his agents from interfering, trespassing or erecting any building on plot number 2 Kugitimo Market.

The appellant shall have costs of the appeal and the lower court. Orders accordingly.

Judgment dated, signed and delivered at **Kisii** this 21st day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for appellant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE