

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

HCA NO.82 OF 2010 AND MISC. APPL. NO.70 OF 2009

(CONSOLIDATED)

DANIEL MANYONGE WASWA.....APPELLANT

~VRS~

PHARIS WEKESA MASIBO.....RESPONDENT

(Appeal from the judgment and decree of the Resident Magistrate Hon. P. Achieng at Bungoma in Civil case no.154 of 2007)

JUDGMENT

In an amended plaint filed on 15/7/1991 the Respondent filed a suit against the Appellant claiming that he was the registered proprietor of land parcel no.E.Bukusu/S.Kanduyi/4106 measuring about 0.84 Hectares which on 28/2/1989 the Appellant had unlawfully entered, removed the sisal boundaries and begun to plough wanting to plant maize as a result of which he had suffered loss and damage. The suit was for eviction, a permanent injunction and *mesne* profits. The Appellant filed a defence and counterclaim in which he denied the claim and stated that he owned the land which he had occupied since birth. In the counterclaim he sought that the title in the name of the Respondent be cancelled as the same was obtained by fraud. It was further sought that after the cancellation the land be registered in his name.

The trial court received evidence from the Respondent and Appellant. The Respondent's case was that he bought the suit land from the Appellant's father in 1974 and got title on 4/1/1989 before the Appellant's father died in 2001. He exhibited the title deed. The Appellant produced title deed in his name for E.Bukusu/S.Kanduyi/9354 measuring 1.26 Hectares which he said was for the suit land and which he stated that he has lived on since he was born after having been given by his father. The title was registered on 8/11/2006. His case was that the Respondent had obtained his registration fraudulently, a matter his father was pursuing before his death.

The trial court found for the Respondent and granted the orders of eviction and permanent injunction. It dismissed the counterclaim. The Appellant was aggrieved and filed this appeal.

Once the Appellant pleaded that the registration in the name of the Respondent was obtained fraudulently and he sought its cancellation, the entire dispute could only be heard and determined by the High Court. Indeed the trial court acknowledged in the judgment that the orders in the counterclaim could only be granted by the High court. It, however, went on to dismiss the counterclaim. If the court did not have jurisdiction to hear the counterclaim it could not dismiss the same. The trial and judgment were consequently a nullity. The parties shall take the necessary steps to have their dispute heard by a competent court. I ask that each party bears his own costs.

Dated, signed and delivered at Bungoma this 19th day of September, 2012.

A. O. MUCHELULE
JUDGE

