



REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 95 of 2008

MUNUVE MUTEMI.....APPELLANT

VERSUS

MUTIE MUTISYA.....RESPONDENT

*(Being an appeal from the original ruling of the Mwingi Resident Magistrate's Court Land Case no. 63/1999 by Hon. S. Ongeru, RM On 28/4/2008)*

**JUDGMENT**

This appeal emanates from the ruling of the Mwingi Resident Magistrate's Court in Land Case no.63 of 1999 dated 28<sup>th</sup> April, 2008. In the ruling the learned magistrate held thus:-

***“From the above arguments and my reasoning, I am compelled to reach the inescapable conclusion that whereas the plaintiff opted not to pursue the 2<sup>nd</sup> alternative the defendant pursued the 1<sup>st</sup> alternative whether wholly or partly is another issue at a different forum. It will be noted that there were only 2 options for the parties to pursue. If one was not pursued then any action pursued must be in the perspective of the other alternative. I therefore find that the defendant has failed to show cause and proceed to order that he be evicted from the suit land. Orders accordingly.”***

Aggrieved by the order, the appellant lodged this appeal citing 6 grounds to wit:-

- 1. That the learned magistrate erred in law and in fact in holding that appellant should be evicted from the suit land.***
- 2. That the learned magistrate erred in law and in fact in finding that the appellant had exercised the option to accept the costs of the suit and forgo the land suit.***
- 3. That the learned magistrate erred in law and in fact in misinterpreting the decisions of 21<sup>st</sup> December, 1999 and 9<sup>th</sup> November, 2000.***
- 4. That the learned magistrate failed to appreciate that the earlier decision of 21<sup>st</sup> December, 1999 and 9<sup>th</sup> November 2000.(sic)***
- 5. That the learned magistrate failed to appreciate that the earlier decision of 21<sup>st</sup> December 1999 was reviewed or revised or altered by the court in its later decision of 9<sup>th</sup> November 2000.***
- 6. That the learned magistrate failed to appreciate that the respondent failed to take any of the options***

***availed to him by the court in the court's decision of 21<sup>st</sup> December, 1999 hence the decision of 9<sup>th</sup> November 2000.***"

It would appear that the genesis of this appeals is the notice to show cause dated 23<sup>rd</sup> July 2007 which arose from this appellants land dispute tribunal's decision adopted by court on 21<sup>st</sup> December 1999. The tribunal had expressed its decision in the alternative thus:-

***"1. The seller of the land M.r Mutie Mutisya refund the money back to the buyer, Mr. Munuve with costs of the case or,***

***2. The buyer who is Mr. Munuve Mutemi pay the balance of Kshs. 500/= and take piece of the land sold to him by the father of the plaintiff Mr. Mutie Mutisya.***

From the record the respondent refused to exercise either of these options. This led the court to order that:-

***"Since the plaintiff has refused to accept the money Kshs.500/= and since the appeal period is over and there is no stay of execution, I order that the defendant file his bill of costs and thereafter apply for execution (or eviction) after filing the necessary papers the matter will be given a hearing date."***

In obedience to this direction by the court, the appellant filed his bill of costs which was taxed at Kshs.12,410/=. This amount together with subsequent costs accruing during the proceedings was paid.

The respondent then applied for the eviction of the appellant which the court by the ruling of 28<sup>th</sup> April 2008 implicitly allowed. This ruling and order is the subject of this appeal. When the appeal came before me for directions on 18<sup>th</sup> November 2011, part of the directions were that the appeal be canvassed by way of written submissions. Though the respondent had been served with the hearing notice for that day he failed to turn up. Again when appeal came before me on 19<sup>th</sup> July, 2012 to find out whether respective submissions were on board the respondent though served with a mention notice, again failed to turn up. Nor had he filed his written submissions. Accordingly, the only submissions on record were those of the appellant. In other words, the court treated the appeal as uncontested.

In allowing the notice to show cause, the court failed to consider that the respondent had elected not to exercise any of the two options. In essence, the respondent was asking for an equitable remedy and he was unwilling to do equity himself. The respondent still has the money paid by the appellant on account of the land and yet the court allowed him to evict the appellant. The trial court erred in this by allowing the respondent to have his cake and eat it. Having failed to refund the money paid by the appellant in the sum of Kshs.85, 200/= and him having refused to accept the balance of Kshs.500/= it was not available for the respondent to apply for the eviction of the appellant.

Again it appears that, the learned magistrate did not fully appreciate the effect of the order made by the same court on 9<sup>th</sup> November 2000. The court was order very specific that it was the appellant who could either apply for execution or eviction after taxation of his bill of costs. The appellant's taxing of his bill of costs was merely in obedience of this directive. It did not have the effect of turning the tables such that the respondent could now apply to evict the appellant as held in the ruling of 28<sup>th</sup> April, 2008. To this end, the learned magistrate misdirected himself and arrived at a wrong conclusion.

The upshot of the foregoing is that it is explicit from the record that the ruling by the Mwingi Resident Magistrate's Court ordering the eviction of the appellant was unfounded and based on wrong interpretation of the tribunal's decision adopted by the court on 21<sup>st</sup> December 1999 as well as the court's directions of 9<sup>th</sup> November 2000 and ought therefore to be overturned by this court.

Accordingly, the appeal is allowed and the order by the learned magistrate dated 28<sup>th</sup> April, 2008 set aside. The appellant shall have the costs of the appeal.

**DATED, SIGNED and DELIVERED at MACHAKOS, this 15<sup>TH</sup> day of OCTOBER 2012.**

**ASIKE-MAKHANDIA  
JUDGE**