



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**

**CIVIL APPEAL NO. 120 OF 2010**

**ELIAS KIPTOO RUTO.....APPELLANT**

**VERSUS**

**SAMWEL KIRUGU MANYAKA.....RESPONDENT**

*(Being appeal against Judgment of Kapsabet Principal Magistrate's Court Civil Case No. 196 of 2010*

*delivered by J.M. Njoroge – Principal Magistrate on 29<sup>th</sup> June, 2010)*

**J U D G M E N T**

This appeal arises from the decision of the learned Principal Magistrate at Kapsabet made on the 29<sup>th</sup> June, 2010 in **PMCC. No. 196 of 2008** in which the appellant, **Elias Kiptoo Ruto**, was sued by the respondent **Samwel Kiragu Munyaka** on the basis of the averments contained in the plaint dated 28<sup>th</sup> November, 2003. It was therein alleged that the plaintiff (respondent) was the allottee of Kiosk No. 192 adjoining the defendant's (appellant) kiosk No. 193 but on the 16<sup>th</sup> March, 2008, the defendant demolished a wall separating the two kiosks and merged them into one. The defendant then took over possession and occupation of the kiosks and put into operation a hotel business. Despite several requests made by the plaintiff for the defendant to hand over to the plaintiff kiosk No.192, the defendant adamantly refused to do so on the pretext that being of the Kalenjin community he had acquired "ownership" of the said kiosk No. 192 during the post election violence.

It was the plaintiff's contention that the defendant's aforementioned conduct was unlawful thereby depriving the plaintiff of the use of the material kiosk and its rental gain. The plaintiff therefore prayed for an order of injunction restraining the defendant his agents/servants and/or employees from possession, use and occupation of the material kiosk No. 192. Further, the plaintiff prayed for an order for vacant possession and payment of rent at Kshs.4,000/- from 31<sup>st</sup> January, 2008 until payment in full. He also prayed for the costs of the suit.

In his testimony before the learned trial Magistrate the plaintiff (PWI) stated that the material kiosk

No.192 was allocated to him by the Kapsabet Municipal Council. He put up the kiosk and operated an electric sale and repair business. The defendant was his neighbour occupying plot No.193 but due to the post election violence he (plaintiff) fled from the area. In March, 2008 the defendant broke into his kiosk and linked it to plot No.193. The defendant refused to vacate the premises despite being requested by the Municipal Council to do so. Instead he (defendant) offered to purchase the kiosk.

Consequently, this suit was instituted against the defendant and in the process, the court ordered the closure of the material kiosk allowing it to remain under the defendant's possession in as much as the defendant's property remained therein. The plaintiff contended that since January, 2008, the defendant has occupied the material kiosk without paying a monthly rent of Kshs.4000/-. He prayed for vacant possession of the kiosk and the payment of rent by the defendant.

Testifying on behalf of the plaintiff, **Elijah Mukono** (PW2) stated that the material kiosk originally belonged to him but its initial timber structure was razed to the ground. He then sold the vacant space to the plaintiff in the year 2004. Thereafter the plaintiff constructed a new kiosk on the site.

Elijah (PW2) further stated that the kiosk was initially purchased by himself from somebody else. **Nelson Kibiogo Bitok (PW3)**, a revenue officer with the Kapsabet Municipal Council indicated that the material kiosk was allocated to Elijah Mukono in the year 2006 but this was changed to the plaintiff after the two entered into an agreement to that effect.

Bitok (PW3) confirmed that the kiosk No. 193 belonged to defendant and said that kiosk owners were required to pay a monthly kiosk rent of Kshs.800/- which was later enhanced to Kshs.600/-. He said that the rent for the material kiosk was paid by the plaintiff who later complained that the defendant had vandalized and taken over the kiosk. The municipal council wrote to the defendant giving him a period of twenty four (24) hours to vacate but all in vain. The matter was reported to the police but the defendant remained in possession of the kiosk without payment of rent. The evidence by Bitok (PW3) culminated the plaintiff's case against the defendant.

In his statement of defence filed on the 6<sup>th</sup> January, 2008, the defendant denied the allegations made against himself by the plaintiff and contended that the plaintiff had never owned and/or occupied the material kiosk No. 192 neither was it allotted to him by the Kapsabet Municipal Council. Further, the kiosk was owned by Elijah Mukono, the original allottee who sold it to the defendant on a willing seller/buyer basis. It was also contended by the defendant that he was in lawful occupation of the material kiosk thereby rendering the plaintiff's prayers for rental payment and vacant possession untenable.

The defendant therefore prayed for the dismissal of the plaintiff's case with costs. In his evidence, the defendant (DW1) said that he operated a hotel and butchery business within Kapsabet townships and that Plot No.192 belonged to Elijah Mukono who expressed the willingness to lease the building thereon as the plaintiff had already fled from the area due to the post election violence. He (DW1) leased the plot and an agreement to that effect was reduced into writing. The rent payable was Kshs.2000/- per month. A sum of Kshs.120,000/- was paid but Kshs.36,000/- of the amount was to be paid to the municipal council as payment for rates. However, On 8<sup>th</sup> July, 2009, the plaintiff and Mukono demanded the plot but he (defendant) asked for a refund of the amount paid by him for the plot.

The defendant contended that the plaintiff is not the owner of the suit property and should have sued Mukono.

**William Kiplagat** (DW2), a businessman at Kapsabet township stated that the material plot was sold to the defendant by Mukono and an agreement was made to that effect. He (DW2) indicated that he was a signatory to the agreement and that a sum of Kshs.120,000/- was received by Elijah Mukono.

An enforcement officer with the Kapsabet Municipal Council (**Christopher Kiptum Biwott** (DW3)) stated that on the 9<sup>th</sup> July, 2008, the council received a sale agreement made between Elijah Mukono and the plaintiff involving the material plot No. 192. He (DW3) confirmed that Plot No.193 was allotted to the defendant and that after the last general election the material plot No. 192 was vandalized. He (DW3) said that the council did not receive any sale agreement between the defendant and Elijah Mukono, the registered proprietor of the plot.

After due consideration of the foregoing evidence, the learned trial Magistrate concluded that the material plot No. 192 was unlawfully occupied by the defendant who partitioned it and failed to vacate in spite of a court order directing him to cease from using and taking over possession of the same. To that effect, an order of injunction was issued against the defendant who was in addition, ordered to pay a monthly rent of Kshs.4,000/- to the plaintiff with effect from 31<sup>st</sup> January, 2008. It was also ordered that vacant possession of the material plot be given to the plaintiff immediately and that any repair costs be paid by the defendant. The costs of the suit and interest were to be borne by the defendant. Being dissatisfied with the decision of the learned trial Magistrate, the defendant preferred this appeal on the basis of the following grounds;

- (1) That the learned trial Magistrate erred in law and fact in failing to note that the respondent/plaintiff could not stand in the eye of the law as it was not supported by any documentary evidence.**
- (2) That the learned trial Magistrate erred in law and fact in failing to note that the respondent did not produce any documentary evidence to support his claim against the appellant/defendant.**
- (3) That the learned trial Magistrate erred in law and fact in failing to note that the respondent prayer for an order of injunction could not be given against the appellant as the appellant is already in occupation of Plot No. 192.**
- (4) That the learned trial Magistrate erred in law and fact in failing to note that the appellant is a stranger to the agreement made between the respondent and Elijah Mukono.**
- (5) That the learned trial Magistrate erred in law and fact in failing to consider the evidence produced by the appellant's witnesses.**
- (6) That the learned trial Magistrate erred in law and fact in failing to note that Plot No. 192 belongs to the Municipal Council.**
- (7) That the learned trial Magistrate erred in law and fact in failing to put into consideration the agreement produced by the appellant made between the appellant and Elijah Mukono, the original allottee of the plot.**
- (8) That the learned trial Magistrate erred in law and fact when he gave judgment for the**

**respondent against the weight of the evidence.**

**(9) That the learned trial Magistrate erred in law when he gave a decree a day after judgment yet there was a thirty (30) days stay of execution.**

These grounds were relied upon by the appellant who represented himself at the hearing of the appeal and emphasized in his submissions that there was an agreement made between him and Elijah Mukono but he (Mukono) conspired with the plaintiff to frustrate and deny him (defendant) a sum of Kshs.120,000/- which had been paid for the material plot.

The appellant also submitted that Elijah Mukono did not produce any agreement yet he claimed that he sold the plot to the respondent in the year 2004 and that the agreement with the municipal council dated 9<sup>th</sup> July, 2008 may not be referring to the material plot.

The appellant contended that the kiosks in Kapsabet belonged to the Kapsabet Municipal Council and not individuals and that he was allowed to use the name of Elijah Mukono to occupy the material plot for a period of five years on payment of a sum of Kshs.120,000/- to the said Elijah Mukono. He (appellant) was also to pay a monthly rent of Kshs.2000/- to Elijah Mukono and a monthly charge of Kshs.600/- to the Municipal Council.

In opposing the appeal, the respondent appearing in person submitted that despite an order made by the court on 17<sup>th</sup> December, 2008 restraining the appellant from operating the suit premises and a further order made on 29<sup>th</sup> October, 2010 for the appellant to surrender the material plot and pay damages to the respondent, the appellant failed to obey both orders.

The respondent contended that the alleged agreement made between the appellant and Elijah Mukono and the alleged payment of Kshs.120,000/- was not in writing and that the purported written agreement was a forgery witnessed by the appellant's only employee who disowned it. Further, Elijah Mukono, the original owner of the plot sold the same to the respondent as confirmed by an agreement entered between themselves. The respondent then constructed a permanent kiosk on the plot after the previous one was destroyed by fire. The respondent denied the alleged conspiracy between him and Elijah Mukono who is not even known to the appellant.

The respondent submitted that the appellant alleged that he rented the kiosk and did not purchase it and since his term of leasing expires in March, 2012, it would not be renewed by Elijah Mukono as he denied ownership of the material plot. Further it would not be possible for the appellant to surrender the plot to Elijah Mukono.

The respondent urged this court to dismiss the appeal and contended that the material plot is his source of income and livelihood but its occupation is with the appellant.

This is a first appeal the role of a first appellate court is to re-evaluate and analyse the evidence adduced in the trial court with a view to arriving at its own conclusion while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses(see **Selle & Another Vs. Associated Motor Boat Co. Ltd. & Others (1968) EA. 123 and Kogo Vs. Nyamogo and Nyamogo Advocates (2004)1KLR 367.** Having considered the evidence adduced before the learned trial Magistrate in the light of the

grounds of appeal and the submissions made thereof for and against; this court is disinclined to interfere with the decision made against the appellant by the trial court. This is because the evidence by both the appellant (DW1) and the respondent (PW1) showed that the material plot belonged and still belongs to the Kapsabet Municipal Council and that it was initially allotted to Elijah Mukono (PW2) who later sold and handed the kiosk erected thereon to the respondent. He (PW2) disowned the agreement dated 20<sup>th</sup> May, 2005 allegedly entered between himself and the appellant for the lease of the plot. He contended that he had never dealt with the appellant and did not even know him.

The Revenue Officer (PW3) confirmed that the records held by the Kapsabet Municipal Council show that the material plot was allocated to Elijah Mukono but was transferred to the respondent after the two entered into an agreement to that effect. He (PW3) further confirmed that the payments to the council from the plaintiff were made by the respondent and the said Elijah Mukono.

Incidentally, the appellant's witness as enforcement officer with the Kapsabet Municipal Council (DW3) confirmed that the sale agreement entered between Elijah Mukono and the respondent was received by the council but not that allegedly made between the appellant and Elijah Mukono. In effect, the respondent rather than the appellant was recognized by the council as the lawful occupant of the material plot No. 192. It was shown that the attempt by the council to have the appellant vacate the property proved futile such that the matter had to be referred to the police.

It was therefore correct for the learned trial Magistrate to hold that the occupation of the material plot by the appellant was unlawful. This court would hereby uphold that finding which gave rise to the grant of respondent's prayer for vacant possession of the suit property and/or payment of rent for the property from 31<sup>st</sup> January, 2008 upto the time when such vacant possession will be given. In the circumstances, the respondent's prayer for an order of injunction against the appellant was a misconception and ought not have been granted by the learned trial Magistrate.

It would appear from the appellant's statement of defence and evidence that he was aggrieved by the respondent's and Elijah Mukono's failure to refund him a sum of Kshs.120,000/- allegedly paid by him for the material plot on the basis of the disowned agreement entered between him and Elijah Mukono.

If indeed there was such an agreement, the person responsible for any loss that might have been occasioned to the appellant was the said Elijah Mukono and not the respondent.

The respondent was the innocent party but was apparently made to suffer at the instance of the appellant who continued to unlawfully occupy that which was not allotted to him by the Kapsabet Municipal Council and which he took possession of in a manner which was highhanded and unlawfully under the cover of the 2007/2008 post election violence. He should retreat to his lawful occupation of Plot No. 193 and leave Plot No. 192 to the respondent or prepare to pay rent thereof to the respondent at a monthly rate of Kshs.4,000/- with effect from 31<sup>st</sup> January, 2008 until vacant possession of the plot is given to the respondent. To that extent, the order for vacant possession made by the learned trial Magistrate is hereby sustained. In the alternative, the appellant do pay rent for the material premises at a monthly rate of Kshs.4,000/- with effect from 31<sup>st</sup> January, 2008 upto such time that vacant possession shall be given. In default, an eviction order be issued against the appellant.

The prayer for damages and/or repair costs granted against the appellant by the learned trial Magistrate is hereby set aside for lack of proper basis.

Otherwise, the appeal is dismissed with costs to the respondent both at this stage and at the lower court stage.

Ordered accordingly.

Dated, delivered and signed this 8<sup>TH</sup> day of February 2011.

**J.R. KARANJA**

**JUDGE**