



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CORAM: F. AZANGALALA J.**  
**CIVIL APPEAL NO. 73 OF 2003**

**BETWEEN**

**LOICE KORIR .....1<sup>ST</sup> APPELLANT**  
**NICHOLAS KIPNGETICH .....2<sup>ND</sup> APPELLANT**  
**DAVID KIPLAGAT .....3<sup>RD</sup> APPELLANT**

**A N D**

**DANIEL KIPSANG KIPNYANGO .....RESPONDENT**

*[Being an appeal from the Judgment of the Principal Magistrate -*

*F. A. Mabele dated 15<sup>th</sup> May, 2003 at the Principal Magistrate's Court Kapsabet in Civil Case No. 82 of 2001*

**JUDGMENT**

This appeal is from the judgment and decree of the learned Principal Magistrate, **F. A. Mabele**, dated 15<sup>th</sup> May, 2003 in Kapsabet Principal Magistrate's Court, Civil Case No. 82 of 2001. The appellants, **Loice Korir**, **Nichoals Kipngetch** and **David Kiplagat** were the defendants in the original action and the respondent **Daniel Kipsang Kipnyango** was the plaintiff. The respondent sought the following relief:

**“ (a) Orders that the defendants are trespassers to land parcel Number-Nandi/Ndulele/926 (hereinafter “the suit land”) and that a permanent injunction do issue against them restraining them from trespassing and that eviction orders ought to issue against them”.**

The respondent pleaded that he was the registered proprietor of land parcel No. Nandi/Ndulele/926 measuring 3.64 hectares upon which the appellants had encroached and had committed acts of trespass thereon.

The appellants filed a defence in which they, *inter alia*, denied the trespass and further that the respondent was registered as an owner of the suit land absolutely. The appellants specifically pleaded that they had been in occupation of the suit land since 1971 and further that if the title of the suit land had been obtained by the respondent, then the same had been so obtained by unlawful means.

At the trial, the respondent testified and called two witnesses, **Christopher Korir**, (P.W.2), the

previous owner of the suit land, and **Fredrick Kimoi Kipnyango**, (P.W.3), the respondent's brother. The respondent's case was that he had been approached by P.W.2 to purchase the suit land and he agreed to do so. He used P.W.3 as his man on the ground until the suit land was transferred to him. **Christopher Korir**, the previous owner, supported the respondent's testimony that he had indeed sold and transferred the suit land to the respondent leaving an 8 acre piece of land for the appellants. P.W.3's testimony resonated with that of the respondent and P.W.2.

The appellants' case before the learned Principal Magistrate was that they, as the wife and children of P.W.2 respectively had been living on land parcel No. **Nandi/Ndulele/652** since 1972 and were not trespassers. They were not consulted when the suit land was sold to the respondent and when they were informed, they lodged a caution against land parcel No. **Nandi/Ndulele/652** and could not understand how the same was sub-divided and a portion thereof transferred to the respondent.

After analyzing the evidence which was adduced before him, the learned Principal Magistrate found that the respondent was the registered proprietor of the suit land and further that P.W.2, the previous proprietor, had acknowledged that he had sold the land to him. The respondent's case, according to him, had therefore been proved to the required standard and he entered judgment for the respondent in terms of the reliefs sought in the plaint.

That decision triggered this appeal by the respondents (now appellants). They have put forward two grounds of appeal expressed as follows:-

1). That the learned trial Magistrate erred in law in holding that he had jurisdiction to hear a dispute relating to trespass to land notwithstanding the clear provisions of the Land Disputes Tribunals Act.

2). That the learned trial Magistrate erred in law in holding that transactions could be registered in respect of the suit land notwithstanding the existence of a valid caution prohibiting any dealings therein.

The challenge by the appellants is therefore purely on matters of law determined by the Learned Principal Magistrate. I have considered the record of the Learned Principal Magistrate, the grounds of appeal and the submissions of counsel. Having done so, I take the following view of the matter.

This is a first appeal. It is therefore by way of a retrial. I must therefore reconsider the evidence re-evaluate the same and draw my own conclusion, bearing in mind that I have neither seen nor heard the witnesses testify and should make allowance for that. (See **Selle and Another –vrs Associated Motor Boat Company Limited and Others [1968] E.A. 123**). It is also trite that I am not necessarily bound to follow the trial court's findings of fact if it appears either that the court failed to take into account particular, pertinent circumstances or if the impression based upon the demeanor of witnesses is inconsistent with the evidence adduced (See **Abdul Hameed Seif –vrs- Ali Mohamed Sharan [1955] 22 EACA – 270**). I also keep in mind the principle enunciated in the decision of the Court of Appeal in **Peters –vrs- Sunday Post Limited [1958] E.A. 424** which was expressed as follows:-

**“ It is a Strong thing for an appellate Court to differ from the findings on question of fact of the 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 may only interfere with the trial Court's finding of fact if the finding was 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 those findings. (See **Ephantus Mwangi & Another –vrs- Wambugu [1983/84] 2 KEA 100**).

In the appeal before me, the issue of the Principal Magistrate's jurisdiction to consider the matter has been raised. The challenge is no doubt raised with section 3 (1) of the Land Disputes Tribunals Act No. 8 of 1990 in mind. The section reads as follows:-

**“ 3 (1) Subject to this Act, all cases of a Civil nature involving a dispute as to :**

- (a) The division of or the determination of boundaries to land including land held in common;**
- (b) A claim to occupy or work land or**
- (c) Trespass to land**

**Shall be heard and determined by a Tribunal established under section 4.”**

The respondent's claim before the Principal Magistrate was for the following orders:-

**“ Orders that the defendants are trespassers to land parcel number Nandi/Ndulele/926 and that a permanent injunction to issue against the defendants to restrain them from trespassing and that eviction orders ought to issue against them.”**

Three orders are sought namely, a declaration that the appellants were trespassers on the suit land, a permanent injunction restraining them from trespassing on the suit land and eviction of the appellants from the suit land. It is plain therefore that the respondent's claim before the learned Principal Magistrate, was not merely of trespass to the suit land. He sought a declaration, an injunction and an eviction which reliefs could not be obtained before a Land Disputes Tribunal established under the Land Disputes Tribunal Act aforesaid. In any event, the defence delivered by the appellants put the matter clearly beyond the jurisdiction of Land Disputes Tribunal. The appellants pleaded as follows in paragraph 4 of their written statement of defence:

**“4. The Defendants deny the contents of paragraph 5 of the plaint and aver that they have been in occupation of the suit piece of land since 1971.” AND in paragraph 5 as follows:**

**“ The defendants deny in toto the contents of paragraph 6 of the plaint- and more particularly the allegations of trespass and without prejudice, to the foregoing the defendants aver that if the title of possession of the suit piece of land has been obtained by the plaintiff, the same was unlawfully obtained.”**

The appellants therefore, in an indirect manner, set up a defence of continuous possession of the suit land since the year 1971; (Limitations). They also challenged the legality of the respondents' title to the suit land. The twin challenges were clearly beyond the jurisdiction of a Land Disputes Tribunal.

It is also significant that at the trial, the appellants raised issues of whether consent to the transaction between the respondent and P.W.2 had been validly sought and/or obtained and whether a valid sub-division of land parcel number Nandi/Ndulele/652 had been effected. Those issues were clearly outside the jurisdiction of a Land Disputes Tribunal.

In the premises, I find and hold that the Learned Principal Magistrate had jurisdiction to determine the issues raised by the parties before him. Ground 1 of the appeal is therefore clearly without merit and is dismissed.

The second ground of appeal is expressed as follows:-

**“2 . That the learned trial magistrate erred in law in holding that transactions could be registered in respect of the suit land notwithstanding the existence of a valid caution prohibiting any dealings thereon.”**

This ground of appeal in effect weakens ground 1 since the issue of a caution against the suit land is beyond the jurisdiction of the Land Disputes Tribunal. Be that as it may be, pleadings of the parties did not mention the existence of a caution against the suit land at all.

I have perused this record and have been unable to trace a copy of the said caution. The appellants did not, in any event, set up a counter-claim in respect of the purported caution. In my view, even if an issue had been framed concerning the caution, it would not have conclusively been resolved without joining the Land Registrar who effected the transfer in favour of the respondent. The learned Principal Magistrate found as follows:-

**“it has been suggested in the defence and also the defence counsel’s submissions that the registration was improperly done because there was a caution .... That could not have been so done because only the cautioner can remove the caution. But the alleged fraud was not pleaded and there is no evidence to prove it.”**

Those findings cannot be faulted as the record clearly exonerates the Learned Principal Magistrate. The issue of the caution was raised in the evidence and in counsel’s submissions but was neither pleaded nor proved.

Even if proof of registration of the caution had been made, it would not have affected the conclusion of the learned principal Magistrate.

In the end, and for the reasons given above, there is no basis for interfering with the findings of the learned principal magistrate. I find that this appeal is without merit and is dismissed in its entirety.

The appellants shall pay the respondent’s costs of the appeal.

It is so ordered.

**DATED AND DELIVERED AT ELDORT THIS  
26<sup>TH</sup> DAY OF JULY, 2011.**

**F. AZANGALALA  
JUDGE.**

**Read in the presence of:-**

1. **Mr. Manani** for the appellant and
2. **Mr. Kiboi** for the Respondent.

**F. AZANGALALA  
JUDGE  
26/7/2011**