



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

**AT KISII**

**Civil Appeal 82 of 2007**

**MAGAIWA CHACHA MAKORERE.....APPELLANT**

**-VERSUS-**

**MARWA GITUGU MWITA.....RESPONDENT**

**JUDGMENT**

The appellant's suit against the respondent was dismissed with costs by the subordinate court. He claimed that he was the owner of plot no. 36, Maberu market in Kuria District and that the respondent had illegally trespassed thereon and erected a semi-permanent house thereby causing him loss and damage. The suit was brought for general damages, costs and interest. The respondent denied the allegations by the applicant and claimed that this was his plot.

The trial court found that either party had bought the plot from the deceased Paul Nchagwa: the appellant having bought it on 12/10/70 for Kshs. 400/= and the respondent on 12/2/70 for Kshs. 4500/=. On basis that the respondent's purchase was earlier, the court found he had better claim and dismissed the appellant's claim.

The grounds in the Memorandum of Appeal are several, but basically allege that the trial court's decision was not supported by the evidence adduced before it. It was alleged in ground 7 that the court purported to decide on the issue of ownership of the plot when the suit before it was for trespass and resulting damage by the respondent. This cannot be a serious claim because in both the pleadings and during evidence each party claimed the plot to be his. The court had to make a finding regarding ownership before deciding whether there had been trespass. In a suit of trespass to land, the plaintiff is claiming that he is the owner of the land which the defendant has without authority or claim or right entered upon it to his detriment. Trespass to land consists in any unjustifiable intrusion by one person upon land owned or possessed by another. It protects the integrity of the land; it protects interest in the possession of the land. In short, the trial court was right in determining who between the parties was the owner of the land. In other words, given the evidence, the appellant had to show he was the owner of the land and that the respondent, without any legal claim, had trespassed on it.

The trial court found that both the appellant and the respondent had entered into agreement with the deceased to buy the plot. Each party produced the agreement he signed in buying the plot and the agreement was not challenged. The appellant, in grounds 3 and 9, took issue with the fact that the evidence by the respondent was at variance with his own pleadings. The respondent testified that he bought the plot from the deceased on 12/2/70 which, according to the appellant, departed from his pleading contained in paragraph 7 of the Statement of Defence. Paragraph 7 states as follows:-

*“ The Defendant states that after the Defendant acquired the said plot the Defendant developed the same and the Defendant has had peaceful and quite possession of the same since 1978 and more particulars whereof are well known to the plaintiff.”*

In the pleading, I find, the respondent was saying that he acquired the plot first and subsequently went into possession in 1978. That is not inconsistent with his testimony that he had bought the land in 1970.

The appellant alleged that the trial court did not appreciate the full tenor and effect of the evidence (ground 4) and that the suit was decided against the weight of evidence (ground 6). That is not true. The court carefully analysed the evidence which it appreciated.

After the court was faced with evidence showing that each party had bought the plot from the deceased, it observed that:

*“the interest of the plaintiff and the defendant appear to be equal and in such a situation I would adopt the authority underlined in the doctrine of equity that the first in time shall prevail.”*

The better way of looking at the evidence is that, after the deceased sold the plot to the respondent on 12/2/70 he had no capacity to sell the same to the appellant or to another party. He could not sell the same plot twice. This is what gives the respondent better claim to the plot.

There were documents produced by the appellant to show he had been paying rent or fees to the Kehancha Municipality over the plot and thought this strengthened his claim to the plot. The genesis of the plot was, however, the purchase from the deceased and not an allocation by the Municipality. The plot was not shown to belong to the Council for it to be able to allocate it to the appellant. In 1998 the Council sought to resolve the ownership dispute between the parties and accepted the appellant's claim. The trial court was alive to that evidence when it decided against the appellant.

I have considered the submissions by Mr. Odhiambo for the appellant and Mr. Odero for the respondent. The first appellate court has the duty to re-evaluate all the evidence adduced before the trial court and reach its own conclusion on the same, taking into consideration that it did not have the advantage of seeing or hearing the witnesses. My own assessment of the recorded evidence shows the trial court reached the correct decision.

I find no merit in the appeal. The same is dismissed with costs.

Dated, signed and delivered at Kisii this 20<sup>th</sup> day of January, 2010.

**A.O.MUCHELULE**

**JUDGE**

**20/1/2010**

Before A.O.Muchelule-J  
Court clerk-Bibu  
Mr. Nyambati for Respondent  
Mr. ogari for Mr. Okongo for Appellant

**A.O.MUCHELULE**

**JUDGE**

**20/1/2010**