

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Civil Appeal 76 of 2006

ROSEMARY WANJIKU MURIITHIAPPELLANT

VERSUS

GEORGE MAINA NDINWA.....RESPONDENT

J U D G M E N T

Rosemary Wanjiku Muriithi, the Appellant herein was sued by the Respondent in EMBU SPM CC NO.80/2004. The plaintiff who is the Respondent sought orders to restrain the Appellant from ever entering into the plaintiffs land parcel No. INOI/NDIMI/1939, stop constructing the building she is constructing on the suit land and to remove the structure and the fence she has erected thereon. The plaintiff's contention is that he is the registered owner of the said plot and the Defendant/Appellant has no right whatsoever over the same and she has trespassed thereon and damaged the Respondent's property.

The Defendant/Appellant filed a defence and counterclaim dated 28/5/2004. According to her, she purchased plot No.1939 but the defendant conspired with the surveyor to alter the survey map to appear as though he was the registered proprietor of plot No.1939 instead of plot No. 1937.

In her counterclaim, she asked the court to find that the registration of the plaintiff as the proprietor of land parcel No.INOI/NDIMI/1939 was fraudulent and out of conspiracy. She therefore asked the court to dismiss the Plaintiff/Respondent's claim and order that plot No.1939 be transferred to her.

The plaintiff reiterated the contents of his plaint in his testimony in court and denied having altered or conspired to alter the mutation forms with the surveyor.

In her evidence in court, the Appellant/Defendant told the court that she bought her parcel of land from Edward Mwai Ndinwa who is the Plaintiff/Respondent's brother. She produced the sale agreement dated 17/12/2003 which does not nonetheless show the number of her plot. The Agreement only describes her plot as

O.114 Ha out of parcel known and described as INOI/NDIMI/1245. What I find intriguing is that by the date of this agreement, the sub-division had already been done and parcel number INOI/NDIMI/1937 transferred to the Appellant on 16/7/2003. Even as at the time she entered into the said agreement therefore, her parcel number was clearly 1937 and not 1939. Parcel No.1939 was and is clearly registered in the names of the Plaintiff/Respondent. Those facts are not disputed and the learned trial magistrate rightly made a finding to that effect. According to Edward Maina Ndinwa who sold the plot to the Appellant, he physically showed her the portion which he was selling to her and that is where she started constructing her house. The evidence of the defence was that the survey as appears in the mutation form was altered.

The learned trial magistrate found that there was no fraud. He did find that page 3 of the mutation form was doctored but he found no fraud. He therefore entered Judgment in favour of the plaintiff and dismissed the defendants counterclaim. That dismissal is what led to this Appeal. The plaintiff proffered 6 grounds of Appeal which he argued together.

According to the Appellant, the problem was not with the Title documents but with the SITE/GROUND. He also found fault with the learned magistrate's finding that there was no fraud yet he made a finding that page 3 of the mutation form had been doctored.

I have considered these grounds carefully along with the evidence adduced before the trial court and the written submissions herein by both counsel. The issue of jurisdiction of the trial court to determine a matter which was based on trespass was raised. It was contended that this matter ought to have been heard before the Land Disputes Tribunal as it was a claim based on trespass to land. A look at the plaint does actually indicate that the claim was based on trespass in which case it would fall under the jurisdiction of the Land Disputes Tribunal Act. It is noted however that in the counterclaim, the defendant pleaded fraud. The court had therefore to determine the issue of fraud in the same suit. Fraud is clearly outside the purview of the Land Disputes Tribunal Act and so the Jurisdiction to hear and determine the suit rightly fell within the jurisdiction of the Magistrate's Court.

On the issue of fraud, I have carefully looked at the mutation form in question. The page that is said to be doctored i.e page 3 has not in anyway whatsoever changed the positions of the parcels of land as indicated on page 2. There are some more numbers and the same appears more detailed but the positions of the parcels of land remains the same. Land Parcel No. 1939 remains '**E**' and it is at the top while plot No.1937 remains '**C**' and is at the bottom left side corner. On page 1 of the mutation form which nobody seems to have a problem with, parcel No. '**C**' is clearly 1937 and according to the list of names on the same page it was supposed to go to the 3rd person in the list which was Edward Mwai. Edward Mwai was DW1 and he was the one who sold his plot to the appellant herein. Plot No. '**E**' clearly belonged to George Maina Ndinwa the Plaintiff/Respondent herein. There was therefore no forgery of the mutation form and there was no fraud either. I uphold the learned magistrate's finding to the effect that fraud was not proved. If indeed there was any problem here, it was DW1 who showed the Appellant the wrong position on the ground.

My finding is that plot No.1939 as indicated in his Title Deed and in the mutation form belongs to the

Plaintiff/Respondent herein. The defendant has no claim on that same whatsoever and she has clearly trespassed on the Respondent's land. Her Appeal has no merit and I hereby dismiss the parcel with costs both in the lower court and in this court to the Plaintiff/Respondent. It is so ordered.

W. KARANJA
JUDGE

Delivered, dated and signed at Embu this 12th May 2010

In presence of:-Both parties but counsel absent.