

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 190 of 2002

JOSEPH MAINA KIRAGUAPPELLANT

- VERSUS -

MAINA MUTUNGU RESPONDENT

JUDGMENT

By an amended plaint, the appellant filed suit against respondent seeking permanent injunction to restrain the respondent, by himself, his servants or agents from constructing, entering, remaining, working, alienating, or in any manner whatsoever interfering with the parcel of land known as LR. No. Nyandarua/Geta Township/39 (*hereinafter referred to as the suit land*). The appellant further prayed for the court to award him general damages for the alleged trespass by the respondent on the suit land. The appellant prayed for the court to issue a demolition order of the structures allegedly illegally erected on the road of access adjacent to the suit land. The appellant prayed to be awarded costs of the suit. The basis of the appellant's suit was a complaint relating to a construction of a permanent structure by the respondent in a parcel of land adjacent to the suit land. It was the appellant's case that the land adjacent to the suit land, to which the respondent lay claim, was in fact, a public road of access and not a parcel of land which could be alienated to an individual. The appellant was aggrieved that the development proposed by the respondent on the said adjacent parcel of land would result in access to his parcel of land being blocked.

The respondent filed defence denying having illegally encroached on the appellant's parcel of land. The respondent averred that he was legally allocated the parcel of land adjoining to the appellant's parcel of land i.e. Plot No.39A Geta Trading Centre. He stated that he had commenced construction on his parcel of land after his building plans were approved by the relevant authority. He averred that, by filing the present suit, the appellant was attempting to unlawfully prevent him from enjoying occupation of a parcel of land that was lawfully allocated to him. He denied the appellant's allegation that he had unlawfully blocked the road of access to the appellant's parcel of land adjoining his. He averred that his parcel of land and that of the appellant, were two distinct parcels of land. The appellant therefore had no right over his parcel of land. The respondent urged the court to dismiss the appellant's suit with costs.

After hearing the evidence adduced by the appellant and the respondent, the trial magistrate, in his considered judgment, found that the appellant had failed to establish his case to the required standard of proof. The trial magistrate held that, from his case, the appellant appeared to be challenging the decision of Nyandarua County Council and the Commissioner of Lands to allocate the land adjoining to his, which he considered as a public road of access, to the respondent. The appellant was aggrieved that one of the three frontage of his plot has thus been blocked. The trial magistrate held that the appellant ought to have enjoined Nyandarua County Council and other relevant entities that were involved in the allocation of the land adjoining to the appellant's parcel of land to the respondent as parties to the suit. He dismissed the appellant's suit with costs.

The appellant was aggrieved by the decision of the trial magistrate and duly filed an appeal to this court. In his memorandum of appeal, the appellant raised three grounds of appeal. He was aggrieved that the trial magistrate had committed an error in law and procedure by reaching a finding that the appellant had sued the wrong party. He faulted the trial magistrate for basing his judgment on the wrong principle of law. He was aggrieved that the trial magistrate had given undue weight to the evidence adduced by the

respondent and given casual consideration to the evidence adduced by the appellant. He urged the court to favourably consider the appeal, set aside the judgment of the subordinate court, and enter judgment in favour of the appellant, as against the respondent, as prayed in the amended plaint.

At the hearing of the appeal, I heard the rival submissions made by Mr. Gathaara for the appellant and by Mr. Karanja for the respondent. I have carefully considered the said rival arguments. I have also read the pleadings filed by the parties in support of their respective opposing positions. I have also re-evaluated the proceedings of the subordinate court, including the documentary evidence adduced by the parties to this appeal. The duty of this court as the first appellate court was succinctly set out by the Court of Appeal in C.A Civil Appeal No.210 of 2006, Lake Flowers vs. Cila Francklyn Onyango Ngonga & Anor (Nakuru) (unreported). At page 5 of its judgment it stated thus:

“Being a first appeal, the principles upon which this Court acts are well settled in that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally – Selle v. Associated Motor Boat Company [1968] EA 123.”

In the present appeal, the appellant was aggrieved by the decision of the trial magistrate on three grounds. This court will address each ground of appeal by considering the submissions made on this appeal and by re-evaluating the evidence adduced before the trial magistrate’s court. On the first ground of appeal, it was the appellant’s submission that the trial magistrate misdirected himself and therefore reached a wrong finding that the appellant had sued the wrong party. From the evidence on record, it was clear that the appellant was challenging the decision of the allocating authority to allocate the land adjoining to his parcel of land to the respondent. The appellant’s case per se was not concerned with his parcel of land but the parcel of land adjoining his. According to the evidence adduced, it was evident that the initial approved plan of Geta Trading Centre designated the two parcels of land adjoining to the appellant’s parcel of land as a lane and a parking respectively. This plan was approved in 1976. According to PW2, Mutahi Wahiu, the County surveyor employed by the Nyandarua County Council, and PW3, Timothy Waiya Mwangi, the District Physical Planner, Nyandarua District, the approved plan of 1976 of Geta Township could be amended by Part Development Plans being subsequently prepared and approved.

From the testimony of the said two witnesses, it was apparent that Parcel No.39A at Geta Trading Centre was lawfully allocated to the respondent after the initial temporary occupation licence issued to the respondent in 1992 was converted into a permanent allocation. The appellant attempted to present to the court a scenario different to what actually transpired when the respondent was allocated the said parcel of land adjoining to his parcel of land. Although the appellant was justified in his complaint that the respondent had been allocated a parcel of land which was originally designated as a public road of access, the appellant sued the wrong party. The appellant should have sued the allocating authority, in this case, the Nyandarua County Council. Although the thrust of the appellant’s sense of grievance appear to be directed at the respondent, it is this court’s view, upon re-evaluating the evidence adduced before the subordinate court, that the respondent cannot be blamed for being a beneficiary of an allotment process which he did not initiate or put into effect. The appellant ought to have addressed his complaint to the allocating authority and not to the beneficiary of the allotment. The appellant cannot challenge the statutory power bestowed upon Nyandarua County Council and the Commissioner of Lands in planning and allocating land in trading centres and particularly within Geta Township by suing the beneficiary of such an allotment. The appellant should have sued either the Nyandarua County Council or the Commissioner of Lands for appropriate remedy, including seeking the cancellation of the allocation of the parcel of land to the respondent.

In any event, it is doubtful whether the appellant would have had *locus standi* to file suit whose subject matter is public land without seeking the authority or the consent of the Attorney General as required

under section 61(1) of the Civil Procedure Act. The appellant would also have had to contend with the provision of section 136 of the Government Land Act that require a suit, brought in regard to any act done under the Act, to be filed within one (1) year from the date which the cause of action arose. Such a litigant is also required to give at least one (1) month's notice before commencing such action. The trial magistrate did not therefore err when he found that the appellant had sued the wrong party and should have instead sued the allocating authority.

On the second ground of appeal, the appellant complained that the trial magistrate had based his judgment on the wrong principle of the law. Having considered the argument presented to the court on this appeal by the appellant's counsel, I was unable to comprehend what the appellant meant when he alleged that the trial magistrate had applied the wrong principle of the law in reaching his decision. It appeared to the court that the appellant's wish was for the trial court to reach a finding that the allocation of the parcel of land adjoining to his to the respondent was unlawful. The appellant relied on the tenuous evidence that was as a result of correspondence generated by various public officers at the instance of the appellant in support of his claim that the allocation of the said parcel of land to the respondent was unlawful. The appellant's case would have been stronger if he had enjoined the allocating authorities as parties to the suit. His case would even have been stronger if the appellant had pleaded for the court to declare the allocation to the respondent as being contrary to the law. The appellant did none of that. Instead, it was apparent to the court that the appellant was seeking to present a new cause of action to this court at the appellate stage. His pleadings did not mirror what was being argued on appeal. It is trite, that this court cannot reach a finding in respect of a matter which had not been specifically pleaded by the parties before it. I therefore hold the second ground of appeal which was to the effect that the judgment of the subordinate court was based on the wrong principle of the law to be without merit.

On the third ground of appeal, that the trial magistrate had given undue weight to the evidence adduced by the respondent as compared to the evidence adduced by the appellant to the detriment of the appellant's case, I hold that the trial magistrate in fact relied, to a large extent, on the evidence adduced by the appellant's own witnesses. On perusing the proceedings of the subordinate court, it became clear that when PW2 and PW3 were testifying, the appellant was not ready to be confronted with the possibility that the allocation of the parcel of land adjoining his to the respondent was actually lawful. At some point in the proceedings, it appeared as if the appellant was disowning the testimonies of his own witnesses. It was the appellant who called the County surveyor and the District Physical Planner in a bid to establish that the allocation to the respondent was unlawful. Instead, the two officers confirmed the allocation to the respondent of the disputed parcel of land was indeed lawful. The trial magistrate did not therefore accord undue weight to the evidence adduced by the respondent. To the contrary, he relied on the evidence adduced by the appellant's witnesses to reach the decision that he did. This court having re-evaluated the said evidence adduced is unable to reach a decision different from that that was arrived at by the trial magistrate.

I find no merit with this appeal. I uphold the judgment of the trial magistrate. The appeal is dismissed with costs to the respondent.

DATED at NAKURU this 22ND day of MAY 2009.

L. KIMARU

JUDGE