



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 392 of 2001

BETH WANJIRU MBATIA.....APPELLANT

AND

HENRY MUIRURI KUNGU.....RESPONDENT

(Being an Appeal from the Judgment of Senior Resident Magistrate the Hon. Mrs. Murage delivered on the 6th day of July 2001 at Nairobi in RMCC No. 1499 of 1999)

J U D G M E N T

1. The Appellant herein, Beth Wanjiru Mbatia was the Defendant in Nairobi RMCC No. 1499 of 1999 in which she was sued by the Respondent herein Henry Muiruri Kungu in connection with Plot No. 4/115 at Soweto Ex-Gitau Village Resettlement Scheme. The Respondent as Plaintiff alleged that he was the allottee of the said plot and that his efforts to develop the plot were frustrated and hampered by the Appellant herein on grounds that the Appellant was the owner of the said plot. The Respondent as Plaintiff prayed for judgment against the Plaintiff for **ORDERS:-**

(a) THAT upon the court establishing that the plot in dispute is plot No.4/115 Soweto, the Defendant do remove herself, her materials permanent and temporary fixtures from PLOT No. 4/115 at her cost OR the Plaintiff be allowed to do so and recover the necessary expenses as may be assessed by this court to be reasonable from the Plaintiff.

(b) THAT a permanent injunction do issue to restrain the Defendant either by herself, her agents, servants, employees or persons claiming through under her from trespassing into plot No. 4/115

(c) General damages for trespass and destruction of the plot.

(d) Any other/better remedy as the court may deem fit and just

(e) Costs of this suit.

The Defendant/Appellant counterclaimed that she was the allottee of Plot No. 4/226 in the same settlement scheme.

2. The court, (Murage Mrs) in her one page judgment found that the Defendant (Appellant) did not prove that she was allottee of the plot in question. The learned Magistrate also found that the Defendant did not call the witnesses to corroborate her claims that she was the allottee of plot 4/226. The Plaintiff's claim was allowed with costs to the Plaintiff. The learned Magistrate also found that on a balance of probability, the Plaintiff had proved his case against the Defendant. The court found that the Defendant

had failed to prove her counterclaim against the Plaintiff. The counterclaim was dismissed with costs to the Plaintiff.

3. It is against the above judgment that the Appellant has appealed. In her Memorandum of Appeal dated 30/07/2001 and filed in court on the 31/07/2001, the Appellant sets out 7 grounds of appeal, that is to say-

1. *THAT the learned magistrate erred in law and fact in shifting the burden of proof from the plaintiff (respondent) to the defendant (appellant).*

2. *THAT the learned magistrate erred in law and fact in relying entirely on the evidence of PW2 which was uncorroborated.*

3. *THAT the learned magistrate erred in law and fact in relying entirely to the evidence of PW2 which was not supported by any documents.*

4. *THAT the learned magistrate clearly erred in law and fact in finding that the defendant had failed to prove her case while the burden of proof rests upon the plaintiff.*

5. *THAT the learned magistrate erred in law and fact in finding that the defendant did not produce any maps to prove the location of her plot while it was for the plaintiff to prove her case and not the defendant to disapprove the same.*

6. *THAT the learned magistrate erred in law and fact in holding that the defendant did not call the surveyor who identified her plot to her while it was for the plaintiff to prove her case.*

7. *THAT the learned magistrate erred in law and fact in finding that the plaintiff had proved his case in a balance of probabilities against the weight of evidence.(sic)*

4. On the basis of the above grounds, the Appellant prays that –

(a) The judgment delivered on 6/07/2001 be set aside and the Defendant's counterclaim allowed.

(b) The Respondent be ordered to pay the costs of this appeal and costs in the subordinate court.

5. At the hearing of the appeal, counsel for the Appellant, Mr. Muriithi argued grounds 1-4 together; grounds 5-6 together and ground 7 by itself. It was argued by counsel for the Appellant that the court erred in accepting the Plaintiff's evidence when the evidence on record showed that the allocation of the suit plot had been done in 1992 and not 1998. Counsel for the Appellant submitted that the Plaintiff's evidence was only hearsay and that it should not have been used against the Appellant. Counsel further submitted that the Defendant's evidence was that she was a squatter at Soweto and that she was allocated a plot in 1992 and that she paid for the same.

6. On grounds 5 and 6, counsel for the Appellant submitted that PW2 on whose evidence the court

relied heavily did not produce primary evidence to support the Plaintiff's case and that the only reason why such evidence was not adduced was because it was likely to be prejudicial to the Plaintiff. Counsel for the Appellant also submitted that the learned magistrate erred when she shifted the burden of proof on the main suit from the Plaintiff to the Defendant. Counsel took this argument further by contending that sections 107 and 108 of the Evidence Act clearly put the burden of proof on the shoulders of the one who alleges. Counsel quoted from **Halisburys Laws of England, Fourth Edition Vol 17** at page 11 paragraph 13 which states in part –

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case, if at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose (Pickup v Thames and Mersey Marine Insurance Co. Ltd. (1878) 3 QBD 594 at 599, 600. --- The golden rule is that the onus of proof is on the Plaintiff: Chapman v Oakleigh Animal Products Ltd (1970)8 KIR 1063 at 1072, C.A per Davies LJ.”

7. Paragraph 14 of the same volume says that “The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been stratified”.

8. Counsel for the Plaintiff/Respondent submitted that this appeal is not only misconceived, but that it is unmerited and an abuse of the court process. Counsel submitted that the evidence in the lower court showed double allocation of the same plot and that the best parties herein could do was to get the help of the city council surveyor who testified as PW2 and said that the plot No. 4/226 allegedly owned by the Appellant did not belong to her. Counsel for the Respondent submitted that the evidence on record showed that Plot No. 4/115 belonged to the Plaintiff as corroborated by the evidence of PW2, one Peter Ngoiru, the then surveyor of the city council of Nairobi. PW2 told the court that while the Plaintiff's name was in the register of allocations and that the plot allocated to him was No. 4/115; the Defendant's/Appellant's name featured nowhere.

9. Regarding ground 7, counsel for the Plaintiff/Respondent submitted that the Appellant failed to prove her case on the counterclaim. Counsel referred to the evidence of PW2 who stated that when the Defendant/Appellant checked with the surveyor's office, the Appellant's name was not in the register against plot No. 4/226.

10. I have read through the entire proceedings and the judgment of the learned magistrate. My duty as an appellate court is to review the evidence to determine whether the conclusions reached by the trial judge should stand, while remembering that this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted for proved, or has plainly done wrong. (see **Peters –vs- Sunday Post Limited [1958] EA 424 and Watt –vs- Thomas [1947]1 AII ER 582**); then I must reverse the decision.

11. The Appellant's complaints in the instant appeal are that the trial court shifted the burden of proof from the Plaintiff to the Defendant. A reading of the judgment does not support the Appellant's allegations. The trial magistrate clearly put the burden of proof for the respective claims on the parties concerned, the Plaintiff/Respondent with respect to plot No. 4/115 and the Defendant/Appellant with respect to plot No. 4/226. The evidence laid before the court, and which evidence I have found satisfactory is that the Plaintiff/Respondent proved ownership of plot No. 4/115 while the Defendant/Appellant did not place sufficient and corroborated evidence before the court in support of her claim to ownership of plot No. 4/226. The only evidence she had was an application form for a plot, nothing else. I also find that the trial court was right in condemning the Defendant/Appellant to pay the costs of the suit.

12. In the result, I see no reason for interfering with the findings of the trial court. This appeal is accordingly dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated and delivered at Nairobi this 25th day of September 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr Ndirangu for Muriithi (Present) for the Appellant

Mr Karago (Absent) but Respondent in Court for the Respondent

Weche - court clerk