



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

**Civil Appeal 32 of 2004**

**STEPHEN MAINA KINYUA ..... APPELLANT**

**VERSUS**

**ROSEMARY NJOKI MAINA ..... RESPONDENT**

*(Appeal from the Judgment of the Senior Principal Magistrate's Court at Murang'a in*

*Civil Case No. 508 of 2003 dated 1<sup>st</sup> March 2004 by G. P. Ngare – R.M.)*

**J U D G M E N T**

This appeal arises from the judgment of the Senior Principal Magistrate's Court at Murang'a dated 1<sup>st</sup> March 2004 in SPMCCC number 508 of 2003. In the lower court the appellant was the plaintiff whereas the respondent who is his mother was the defendant.

The appellant is the registered proprietor of all that piece or parcel of land known as **Loc. 11/Gaitega/419** measuring 0.81 hectares. He apparently purchased the same from one **Elijah Gatuku**. On or about the 16<sup>th</sup> September 2003, the respondent lodged a caution on the suit premises claiming a licensee's interest. On 19<sup>th</sup> November 2003 the appellant through **Messrs Waiganjo Gichuki & Co. Advocates** demanded that she removes the said caution but the respondent failed to do so precipitating the suit whose result is being challenged in this appeal.

When the summons to enter appearance were served on the respondent she reacted by filing an appearance. However she failed to follow up the matter by filing a statement of defence. The matter, it would appear thereafter proceeded by way of formal proof though the respondent through **Mr. J.M. Kagwi Esq. Advocate** whom she had appointed to represent her in the proceedings did cross-examine the appellant.

On 1<sup>st</sup> March 2004 the learned magistrate delivered his judgment in which he dismissed the appellant's claim with costs, provoking this appeal therefor. In dismissing the suit, the learned magistrate stated “... **I find and hold therefore that the plaintiff has not proved that he is the sole proprietor of the suit land herein and that the defendant has some proprietary interest in the same. To order the removal of the said caution therefore will greatly prejudice the defendant as far as that interest is concerned. I decline to grant the same and order that this suit be dismissed with costs to the Defendant...**”

The appellant has advanced five grounds of appeal in the memorandum of appeal filed through

**Waiganjo Gichuki & Co. Advocates.** They are:-

- 1. The learned Resident Magistrate erred in law in not assessing whether the respondent's alleged interest in the suit land was in law sufficient to sustain the caution as lodged by the respondent claiming a licensee's interest.**
- 2. The learned Resident Magistrate erred in law in stating that the only issue for consideration was whether the respondent had any interest in the suit land while the issue for consideration was whether the respondent had a licensee's interest in the suit land since in her caution that was the interest she had claimed.**
- 3. As the respondent had not claimed in the lower court that she had a proprietary interest in the suit land the learned Resident Magistrate ought not to have made such a finding and this means that the court decided the case on matters that were extraneous to the evidence offered and the pleadings before it.**
- 4. The learned Resident Magistrate erred in law in dismissing the appellant's suit on grounds which were not canvassed at the hearing bearing in mind that the respondent had not filed any defence or counterclaim in the suit in that court.**
- 5. The judgment of the lower court is against the weight of the evidence before it and is wholly unjust.**

When the appeal came up for hearing the respondent though served with the hearing notice failed to turn up and being satisfied that she had been duly served and there being no reason(s) for her failure to attend court, I ordered the appellant to prosecute his appeal in the absence of the respondent notwithstanding. The appellant opted to argue his appeal by way of written submissions. I have carefully perused, read and considered the written submissions.

To my mind, the issue for determination before the learned magistrate was simple and clear cut. The appellant was able to demonstrate by production of title documents that he was the sole registered owner and or proprietor of the suit premises. That evidence was neither challenged and or controverted. In the absence of any other evidence to the contrary, the learned magistrate had no other choice

but to act on the same. Unlike in Criminal matters, the standard of proof in civil matters is on the balance of probability and not beyond reasonable doubt. Once the appellant showed that he is the sole proprietor of the suit premises, he had discharged his obligation of proving his case on the balance of probability and was therefore entitled to a judgment. The trial court however proceeded to hold and declare that the respondent had some proprietary interest in the suit premises. This holding is erroneous in the sense that the respondent herself had in the caution claimed a "**Licensee's interest**" and not some unknown proprietary interest. Further it is my understanding of the law that a licensee only stays and retains possession of the land at the mercy of the owner. Once the registered proprietor of the land claims it back, his licence is once and for all terminated. From the evidence on record it is clear

that the appellant had terminated the respondent's licence to occupy the land if at all. Accordingly, the appellant had all the right to move the court to have the caution removed. The court in my view ought to have granted the appellant his wish.

The learned magistrate declined to remove the caution on the mistaken belief that since the appellant had received some financial assistance from the respondent towards the purchase of the suit premises, the respondent thereby had some interest. The magistrate however ignored the evidence of the appellant in which he stated that he had used his own money to purchase the suit premises with a little assistance however from the respondent. The mere fact that the respondent lend a hand to the appellant in time of need cannot per se translate into proprietary interest in the suit premises by the respondent. By so holding the

learned magistrate proceeded, in effect, to declare that the appellant held the suit premises in trust for the whole family. Yet no evidence towards that direction had been offered by the respondent and more so, she had not even counterclaimed. As correctly submitted by learned counsel for the appellant, the learned magistrate in so holding was speculating and using material not pleaded nor canvassed before him to arrive at the decision.

What was the proprietary interest that the learned magistrate conferred on the respondent by his judgment? Was it a purchaser's interest, beneficial interest, or contractual or a Licence. To my mind what was before the learned magistrate was not whether the respondent had any interest in the suit premises. The only issue was whether the respondent had a licensee's interest. The appellant having not offered any evidence to support the caution it was not open to the lower court to go fishing for some other interest that the respondent may have had in the suit premises by virtue of her alleged assistance to the appellant in the purchase of the suit premises.

One salient feature of a licence is that the licensee will generally be in occupation of the suit premises in one way or another. In this case, the respondent had stopped occupying the land about sixteen years ago before she lodged her caution. She could not therefore have claimed a licensee's interest.

I think I have said sufficiently enough to show that the appeal has considerable merit. Accordingly, I allow the appeal and set aside the judgment of the lower court. In its place I substitute an order entering judgment for the appellant as against the respondent as prayed in the plaint

minus costs. There shall also be no order as to costs of this appeal, the parties herein being a mother and son.

***Dated and delivered at Nyeri this 15<sup>th</sup> day of February 2008***

**M. S. A. MAKHANDIA**

**JUDGE**