



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Civil Appeal 93'A' of 1992**

**ZAPHANIA KARIUKI MWANGI ..... APPELLANT**

**VERSUS**

**MAINA KANYAGIA ..... RESPONDENT**

*(Appeal from the Judgment of the Principal Magistrate's Court at Nyeri in Civil Case*

*No. 134 of 1992 dated 6<sup>th</sup> December 1992 by H. N. Ndungu (Miss) – R.M)*

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

By a plaint dated 18<sup>th</sup> May 1992 and filed in the Resident Magistrate's Court, Murang'a, **Maina Kanyagia**, the Plaintiff then and now the respondent claimed from **Zaphania Kariuki Mwangi**, the Defendant then and now the appellant for an order that the appellant together with his family, servants, agents and his property vacate his parcel or piece of land. He also asked for costs of the suit and interest. The respondent's claim was predicated upon the fact that **"....in or about 1972 at Kaganda Scheme, the Defendant left his late father's (Late Mwangi Mukunya's) parcel or piece of land reference No. Loc. 8/Kaganda/156 which is adjoining to my parcel or piece of land reference No. Loc. 8/Kaganda/162 and the said Defendant entered into my said parcel and remained there until now....."**

In response, the appellant denied the respondent's claims stating that **"..... I deny all the particulars contained in paragraph three of the plaint as the piece of land I am now occupying was given to me by my late father Mwangi Mukunya late 1950's and I put the Plaintiff to a strict proof thereof ....."** The appellant went on to plead that he was of unsound mind.

In support of his case, the respondent testified. He called no other witness. He testified that sometimes in 1971, he purchased land parcel **Loc. 8/Kaganda/162** from one **Gichogu Muhoro**. In 1972 however, the appellant entered and settled on a portion of the said parcel of land. Despite repeated demands that he vacates the suit premises, he has refused to do so. The respondent therefore sought the court's intervention of have the appellant evicted from the suit premises.

The appellant too testified and called one witness, **Joseph Njenga**. The appellant testified that he had not occupied the respondent's land and that he occupies his father's land. He built his house where his late father showed him. His witness supported him. He testified that the two parcels of land **Loc. 8/Kaganda/156** and **Loc. 8/Kaganda/162** were demarcated in 1962. After consolidation his father's land was swallowed by **Loc. 8/Kaganda/162**. As a result, this witness spoke to **Gichogu Muhoro**, the proprietor of **Loc. 8/Kaganda/162** and they agreed that he would give to the witness an acre out of the said parcel of land and the witness would in turn give him an equivalent acre so that his father's house is saved from demolition. On that basis the boundary was re-aligned. Later the respondent bought the land from **Gichogu Muhoro** in 1972 and without the knowing the aforesaid agreement, he began creating problems. The matter was discussed before the chief and D.O. who all ruled in favour of the appellant.

The learned magistrate having carefully considered and weighed the evidence tendered found for the respondent holding thus: **"..... Even after weighing the reasoning (sic) the court finds that it is the duty of the party seeking to rely on a certain fact to prove that fact,. In this case the plaintiff has shown that he is the registered owner of Loc. 8/Kaganda/162 and he showed its extent from registry map sheet. Although the defendant said there was an earlier agreement between him and Gichogu to occupy the portion he now occupies of the plaintiff's land in exchange for another, this allegation remains unproved. The defendant did not call Gichogu Muhoro to**

corroborate him as (sic) this fact nor is the written agreement talked of by his brother exhibited in court. The court must go on the evidence before it, which is that the defendant currently occupies a portion of the plaintiff's land without any good reason. Justice demands that he vacates forthwith with his servants and or agents”.

It is the aforesaid holding that has triggered this appeal. By a memorandum of appeal dated 21<sup>st</sup> December 1992 and filed in court on 22<sup>nd</sup> December 1992, the appellant faults, the learned magistrate's judgment on the following grounds:-

1. **The learned trial magistrate erred in law and fact in failing to notice in the pleadings that the respondent in Misc. Application No. 8/92 was one Joseph Njenga who was alleged to have entered in parcel No. Loc. 8/Kaganda/162 and not the appellant in civil suit No. 134 of 1992 and if she had noticed the name, she could not have proceeded with the suit until the present appellant was made a party to the application.**
2. **The learned trial magistrate erred in law and fact in failing to consider or give a finding on the allegation of appellant's unsound mind as indicated in paragraph 2 of the defence and if she could have asked the respondent to comply with Order XXXI of Civil Procedure Rules.**
3. **The learned trial magistrate erred in failing to hold that the appellant had been in occupation of the said portion of land before land consolidated and after uninterrupted for a period of 27 years.**
4. **The learned trial magistrate erred in failing to hold that the portion the appellant is occupying is not physically included in the respondents land as there is a district boundary but relied on the map which is not an authority to the measurements.**
5. **The learned trial magistrate erred in failing to hold that the suit filed by the respondent and the defence filed indicated a boundary dispute which as provided by section 21 of the registered Act Cap 300 should have been first dealt with by the land registrar and not he court.**
6. **The learned magistrate erred in failing to consider the whole evidence in the record and therefore arrived to a wrong decision.**

When the appeal came up for hearing, the parties filed written submissions in support of their respective positions which I have carefully read and considered.

It is now trite law that it is a very hard thing for an appellate court to interfere with the findings of fact by a trial court particularly if such findings are based on the demeanour of witnesses as observed by the trial court and its general appreciation of the evidence in the case. But if a trial court has failed to appreciate the weight or bearing of circumstances admitted or proved, then an appellate court is entitled to interfere even with its findings of fact – See for example, the case of **Peters v/s Sunday Post Limited (1958) C.A. 423**.

It is apparent to me upon re-evaluation of the evidence on record that the dispute revolved around boundaries. It was in a way a boundary dispute. Even if it was not, one can still surmise from the evidence that it was also a case of trespass. Even on the pleadings alone, one cannot fail to see that indeed the dispute involved both boundaries and trespass. It has to do with two neighbouring but distinct parcels of land namely **Loc. 8/Kaganda/156** and **162** respectively. It is the appellant's submission that the trial court did not have jurisdiction to hear the dispute. Now the jurisdiction to hear and determine dispute relating to **“...the division of, or determination of boundaries to land, including land held in common; claim to occupy or work land; or trespass to land...”** is vested in the land Disputes tribunals by virtue of section 3 of the land disputes tribunal Act. That Act though assented to on 14<sup>th</sup> January 1991, did not come into force until 1<sup>st</sup> January 1993. Indeed the date of commencement was by virtue of legal Notice No. 91 of 1993. The suit in the trial court was filed on 18<sup>th</sup> September 1992, heard and concluded by 8<sup>th</sup> December 1992 long before the Land Disputes tribunals Act 1990 came into force. Consequently the appellant's argument that the trial court had no jurisdiction to entertain the dispute as it was in violation of the clear and mandatory provisions of section 3 (1) of the Land Disputes tribunals Act holds no water at all. The Act having not come into operation then, the learned magistrate therefore had the necessary jurisdiction to hear and determine the matter.

This was the only point taken up by **Mr. Gacheru**, learned counsel for the appellant in his written submissions. It has fallen by the wayside. What else therefore for the appellant. Has his goose been cooked therefore! It would appear so in my considered judgment. However as required of me as a first appellate court, I will still have to subject the evidence tendered during the trial to fresh and exhaustive evaluation. To my mind I think there was sufficient evidence in favour of the respondent. The respondent was able to demonstrate during the trial that he was the registered proprietor of the portion of land occupied by the appellant. He tendered in evidence the necessary title documents. He also tendered in evidence a map from the lands office showing the extent of his land parcel. It clearly shows that the appellant is in occupation of a portion of his parcel of land. The appellant's only response that he occupies that portion of land because

he was given by his father is of no consequence. He did not produce any documents to counter the respondent's position. He tendered no title documents or indeed a map from the Lands office showing the length and width of the land he occupies courtesy of his father. It would have been desirable for him to do so, so that comparing the documents tendered by both the appellant and respondent, the court would have been able to determine once and for all whether the appellant is in legal occupation of the portion of land that he claims to be his. He did not do so. As a consequence, we are only left to go by the documents tendered by the respondent which in any event were not disputed by the appellant. It would appear from the evidence of DW2 that they were aware that the portion of land occupied by the appellant ideally belonged to the respondent. He testified that it had been agreed between him and the previous owner of the land, **Gichogu Muhoro** that the defendant's family would occupy a piece of land in **Loc. 8/Kaganda/162** in exchange for a similar piece of land in **Loc. 8/Kaganda/156**. DW2 went on to state that the demarcation officer was involved and a written agreement to that effect concluded and the only thing left and somehow forgotten was to correct the map and the boundary on the ground. That may well be the position. However the respondent bought the suit premises and was issued with a title deed. The title deed as well as the registry map shows the extent of the suit premises. It shows that the portion occupied by the appellant actually falls within **Loc. 8/Kaganda/162**. By virtue of section 27 and 28 of the registered land Act, the respondent is the sole proprietor of the entire suit premises and his proprietorship cannot be defeated by an alleged agreement that did not involve him and which in any event was not tendered in evidence. The appellant has talked of the dispute being adjudicated upon by the chief and even the D.O. However no record of such proceedings was ever tendered in evidence. Nor was the chief and or D.O. called to testify. Further although the appellant talked of an agreement with **Gichogu Muhoro** to occupy the portion that the appellant now occupies in exchange of another, this allegation too was not proved. As correctly pointed out by the learned magistrate, the appellant did not call **Gichogu Muhoro** to corroborate the fact nor was the written agreement talked of by DW2 exhibited in court. In any event I do not think that such evidence would have made any difference in the light of the fact that respondent had bought the entire parcel of land and had obtained the title to the same without any inhibitions and or encumbrances.

The appellant faults the learned magistrate for failing to consider the allegation of the appellant that he was of unsound mind. This ground of appeal has no merit at all. It is the appellant who claimed to be of unsound mind and not the respondent. It was thus upto him to comply with the requirements of order XXXI of the Civil Procedure Rules. After all it is a cardinal principle of law that a party seeking to rely on a certain fact must prove it. The appellant cannot be allowed to rely on his own mischief. How would the respondent have known his mental condition as to be able to move the court as appropriate. In any event the appellant did testify and called a witness in support of his case. If indeed he was mentally incapacitated, the trial court would not have failed to notice.

The appellant has also faulted the learned magistrate for failing to hold that the appellant had been in occupation of the said portion of land for uninterrupted period of 27 years. It is obvious that the appellant is raising the issue of adverse possession. However that was not the issue before the trial court as it was neither raised in the pleadings nor in evidence. A court of law acts on the basis of the law, pleadings and evidence. The issue having not been raised before the learned magistrate, it did not fall for her consideration.

As to the complaint that the dispute being a boundary dispute, it ought to have been first dealt with by the Land Registrar and not the court, all I can say is that the dispute was strictly not a boundary dispute. It was more of trespass. Accordingly section 21 of the registered land act would strictly not apply. In any event it was open to the appellant to stay the proceedings pending the determination of the dispute by the Land Registrar. He did not do so and he cannot now blame it on the respondent.

As regards whether the respondent in Misc. application No. 8/92 was one **Joseph Njenga** who was alleged to have entered the suit premises and not the appellant, the evidence tendered does not support this proposition. The appellant did not raise the issue during the hearing nor did he submit on it.

I think I have said enough to show that this appeal lacks merit and is accordingly dismissed with costs.

*Dated and delivered at Nyeri this 29<sup>th</sup> day of September 2008*

**M. S. A. MAKHANDIA**

**JUDGE**