



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

Civil Appeal 79 of 1999

JONAH MWOLOLO NZAU:.....APPELLANT

VERSUS

JAMES MUSYOKA WAITA:.....RESPONDENT

JUDGMENT

1. Although the Appeal herein was premised on 11 grounds as set out in the Memorandum of Appeal in fact both advocates condensed them into the following issues;

- i. Whether the learned trial magistrate considered the defence tendered by the Defendant (now Appellants) in reaching his decision
- ii. Arising from (i) above whether there was evidence that the Plaintiff (now Respondent) held the disputed property in trust for the Appellant and that in fact it was the Appellant who fully developed it.
- iii. Whether in relying wholly on the Appellants Affidavit/Statutory Declaration sworn sometime in 1966, the learned magistrate fell into error and reached a wrong decision.

2. The whole dispute revolves around the ownership of Plot No. 55 (originally No.32) Mwingi Market/Township. It was the Respondent's case that he purchased the plot from one Kasura Mako sometime in 1952. He took possession and applied to Kitui County Council for a letter of allotment which was duly issued in his name - P. exhibit 3. Then he started developing it and by the end of 1953, a business premise was on it. P. Exhibit 4 was a business permit dated 31.3.1954, in his name. He added that he stopped his retail business in 1956 and allowed the Appellant, his uncle, to conduct business on the premises as a tenant. He moved away from Mwingi and over the years received periodical rents from the Appellant but then the Appellant started making moves to acquire the property as his own and that is when he decided to take the action of seeking orders inter-alia that the Appellant should vacate the premises and for him to be restrained from continuing to obtain any business permits to conduct any business therein but more importantly, a declaration that the plot in dispute is his property.

3. To authenticate P. exhibit 3- the letter of allotment and to show that the Appellant had no legitimate ownership claim, the Respondent called the Clerk, Mwingi Town Council to produce the Council's records regarding the plot. The Clerk confirmed that the plot belonged to the Respondent and the Appellant's attempts to change ownership were thwarted by the Council and P. exhibit 1 was a letter denying him that opportunity.

4. I will returned to the Affidavit sworn sometime in 1966 by the Appellant stating categorically that he was a tenant on the suit plot but suffice it to say that it was produced as P. exhibit 9.

5. With that evidence in mind, the Appellant's response was as follows:-

That because the Respondent was his nephew, he invited him to become his employee and partly manage his business at Mwingi. He then decided to apply for a plot in the name of the Plaintiff but got one Kasula Mako to sell him a plot and he decided to let the Respondent sign the agreement as the purchaser. The Appellant was aware that the documents relating to ownership were in the Respondent's name but he still decided to construct a building on the plot. Thereafter he commenced various businesses therein including a hotel, bar and restaurant which were still running when the suit was instituted.

6. He admitted that he swore an Affidavit in 1966 stating on oath that there plot in dispute belonged to the Respondent but this was only because one Meta Meta wanted to auction it to redeem a debt owed to him. He continued paying for business permits for the property and all along he knew that the Respondent held the plot in his trust for him. That is why he sold it to his son, Kennedy Musela Mwololo; because ownership could not be disputed.

7. He then called David Musyoki Kyulu who stated that he was aware that the Appellant is the one who bought the suit plot from his cousin and he was aware that the Appellant is the one who constructed the building on the plot. He did not know what happened after 1954 because he left the Appellant's employment. Other witnesses were all employees of the Appellant between 1952 and 1954 and they said that it was the Appellant who constructed the building on the suit premises.

8. Ngwambu Muli in fact said that he was the one employed by the Appellant to put up the said building and he finished it in October 1953.

9. Kennedy Musela Mwololo, the Appellant's son confirmed that he grew up on the plot aforesaid and in 1992 he attempted to change ownership to his name because he had bought it in 1986 and had even reconstructed parts of it. The County Council declined to transfer the plot but he remained in occupation.

10. I have attempted to summarize the evidence by both parties and should now return to the issues for determination. On the first issue, I have carefully read the Judgment of K.O. Ogolla, RM dated 27.4.1999. The same was impressively eloquent, balanced and a proper one within the meaning of Order XX Rule 4 of the Civil Procedure Rules. He duly considered the issues raised by the defence, and decided that they did not carry any weight and I will shortly state why he was right. With respect, the complaint is wholly mischievous and holds no water.

11. On the question of trust, in Mwangi vs Mwangi [1986] KLR 328, the Court of Appeal held that registration of titles is a creation of the law but the considerations surrounding the said registration must be looked at to determine whether it was envisaged that a trust should be created. It is not in doubt in this case that Prima facie the Respondent is the person to whom a letter of allotment was issued by the local authority. That fact has not been denied but to my mind the argument by the Appellant as to the reason for the said fact is spurious. I say so because the explanation is neither reasonable nor believable; that he loved the Respondent as his nephew and purchased land from Kasula Mako and then had it allocated to his said nephew. That having so done, he proceeded to immediately, begin constructing a building on the land and later commenced business in it. That in 1992 he attempted to transfer it to his son Kennedy Musela Mwololo but the local authority refused to do so. He did not take action to regularize his alleged ownership but waited to raise the issue only when the Respondent filed suit in 1995.

12. To my mind, the evidence of a trust must at least be probably and in this case, with respect, it borders on the impossible and I agree with the learned magistrate that when the claim is raised 46 years after the alleged trust was created for no other reason than love and trust, then it becomes the more unbelievable. No trust exists, none was envisaged and none was created.

13. On the last issue, which also touches on the first two issues, the Appellant admits that he swore an

Affidavit in 1966 and admitted on oath, that he was a tenant on the premises. He now wants to change that oath, admit to perjury and expect any serious court to accept his perjury and use it as a basis to say that he owns the suit premises. It matters not because all other evidence would point to one fact; he has no rights over the suit premises and the Affidavit sworn some 29 years before the suit was filed can only but confirm that fact.

14. I should say one thing more; the Appellant paraded persons he called former employees to show that he constructed the building on the suit premises; From what I have read, that evidence is not conclusive of the question of ownership and whichever way it is determined it cannot override the overwhelming evidence that the person lawfully entitled to the plot is the Respondent.

15. It is clear that I find the Appeal wholly frivolous and I have said why.

16. It is dismissed with costs to the Respondent.

17. Orders accordingly.

Dated and delivered at Machakos this 2nd day of December 2008.

Isaac Lenaola

Judge

In the presence of: Mr. Makau Mutua h/b for Mr. Musyoka
for Appellant.

Mr. Muinde for Respondent.

Isaac Lenaola

Judge